DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-1104
Title: Margaret Minneci, et al., Petitioners
v.
Richard Lee Pollard, et al.
Docketed: March 10, 2011
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (07-16112)
Decision Date: December 10, 2010
Questions Presented:

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Mar 9 2011	Petition for a writ of certiorari filed. (Response due April 11, 2011)
Mar 29 2011	Letter of March 29, 2011, from counsel for respondent The GEO Group, Inc. received
Apr 11 2011	Brief of respondent Richard Lee Pollard in opposition filed
Apr 11 2011	Brief amicus curiae of DRI filed
Apr 26 2011	DISTRIBUTED for Conference of May 12, 2011
Apr 26 2011	Reply of petitioners Margaret Minneci, et al. filed. (Distributed)
May 16 2011	Petition GRANTED
May 27 2011	The time to file the joint appendix and petitioners' brief on the merits is extended to and including July 22, 2011
May 27 2011	The time to file respondents' brief on the merits is extended to and including September 12, 2011
Jul 22 2011	Joint appendix filed. (Statement of costs filed)
Jul 22 2011	Brief of petitioners Margaret Minneci, et al. filed
Jul 29 2011	Brief amicus curiae of the United States filed
Jul 29 2011	Brief amicus curiae of DRI filed
Aug 8 2011	SET FOR ARGUMENT ON Tuesday, November 1, 2011
Aug 10 2011	CIRCULATED
Aug 15 2011	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Aug 22 2011	Record received from U.S.D.C. for Eastern District of California. (1 envelope)
Sep 12 2011	Brief of respondents Richard Lee Pollard, et al. filed
Sep 16 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed
Sep 19 2011	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Sep 19 2011	Brief amici curiae of Law Professors filed. (Distributed)
Sep 19 2011	Brief amicus curiae of United Mexican States filed. (Distributed)

Oct 7 2011	Reply of petitioners Margaret Minnec, et al. filed. (Distributed)
Oct 11 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 1 2011	Argued. For petitioners: Jonathan S. Franklin, Washington, D. C., and Pratik A. Shah, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: John F. Preis, Richmond, Va.

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

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No. 10-____

IN THE

Supreme Court of the United States

MARGARET MINNECI; JONATHAN E. AKANNO; ROBERT SPACK; BOB D. STIEFER; AND BECKY MANESS,

Petitioners,

v.

RICHARD LEE POLLARD *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should imply a cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against individual employees of private companies that contract with the Federal government to provide prison services, where the plaintiff has adequate alternative remedies for the harm alleged and the defendants have no employment or contractual relationship with the government.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were defendants and appellees in the proceedings below, are Margaret Minneci, Jonathan E. Akanno, Robert Spack, Bob D. Stiefer and Becky Maness.

Respondent Richard Lee Pollard was the plaintiff and appellant in the proceedings below.

GEO Group, Inc. ("GEO"), sued as Wackenhut Corrections Corporation, was a defendant and appellee in the proceedings below, and the judgment of dismissal as to GEO was affirmed. GEO is a respondent supporting the petition pursuant to Sup. Ct. R. 12.6. GEO has no parent companies and FMR Inc. owns 10% or more of its stock.

Raymond Andrews, Everett Uzzle and Marshall Lewis were named in the complaint as additional defendants. Mr. Andrews was never included in the appeal from the district court's judgment. *See* Appendix ("App.") at 17a n.6. Mr. Uzzle died in 2008, *id.*, and his estate was never substituted as a party pursuant to Fed. R. App. P. 43(a). Dr. Lewis was never served with the complaint or notice of appeal and therefore was never a party in the District Court or the Court of Appeals. App. 17a n.6. Because these individuals were not parties to the proceedings in the Court of Appeals or named in that court's judgment, they are not parties to this proceeding. *See* Sup. Ct. R. 12.6.

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IN THE

Supreme Court of the United States

No. 10-____

MARGARET MINNECI; JONATHAN E. AKANNO; ROBERT SPACK; BOB D. STIEFER; AND BECKY MANESS,

Petitioners,

v.

RICHARD LEE POLLARD *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Margaret Minneci, Jonathan E. Akanno, Robert Spack, Bob D. Stiefer, and Becky Maness respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the Ninth Circuit, as amended, is reported at 629 F.3d 843 and reproduced at page 1a of the Appendix to this petition ("App."). The unpublished order of the District Court is reproduced at App. 70a. The District Court's order adopted an

unpublished recommendation of a Magistrate Judge, which is reproduced at App. 73a.

JURISDICTION

The judgment of the Ninth Circuit was entered on June 7, 2010, and the panel amended its opinion on December 10, 2010. App. 1a. The Ninth Circuit denied a timely filed petition for rehearing en banc on December 10, 2010, with eight judges recording their dissent. App. 4a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

INTRODUCTION

Expressly placing itself in conflict with other circuits, the Ninth Circuit has extended the narrow remedy of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in an unprecedented way, holding that it applies to suits against private, non-governmental employees even though the plaintiff had other adequate remedies available to redress the harm alleged. The opinion of Judge Bea dissenting from denial of rehearing *en banc*—which was joined by seven of his colleagues—amply explains why certiorari is warranted in this case:

> The panel majority—over a vigorous dissent * * *—extends and grants a *Bivens* claim to a prisoner against private company prison guards who are unprotected by notions of qualified immunity, available only to government employees.

> It does so for personal injury claims between California litigants, for acts and omissions which took place in California, and for which California tort law provides adequate remedies through compensatory and punitive damages. In doing so, the panel majority frankly admits its opinion creates an irreconcilable conflict with the decisions of two federal circuits, the Fourth and Eleventh. Further, it disregards the Supreme Court's narrowing instructions on *Bivens*, which have limited recognition of new *Bivens* actions to those situations where, for one reason or another, damages were unavailable under both state and federal law.

App. 4a (footnote omitted).

As these judges recognized, "such an unprecedented opinion demands further review." *Id.* "By recognizing an implied cause of action in this instance, the panel extends *Bivens* far beyond its carefully prescribed contours and places this circuit in direct conflict with each of the other circuits to address the issue." *Id.* at 5a.

The grounds for certiorari in this case are thus unusually compelling. As the Ninth Circuit expressly recognized, it created circuit conflicts on two different components of the question presented. *See* App. 21a. And as Judge Bea noted, this Court's prior *Bivens* decisions show how "marked a departure is the panel majority's opinion from established precedent." *Id.* at 8a. Moreover, this case presents an ideal vehicle to decide the question, which this Court expressly left unresolved in *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 65 (2001). The Ninth Circuit's holding was clear, unequivocal, and dispositive of the case. Given the prevalence of both

private prison operators and prisoner *Bivens* claims, the issue is an oft-recurring one, but there can be procedural obstacles to appellate review of it in other cases. The Court should not pass up this opportunity to resolve the conflict and bring certainty to this important area of the law.

STATEMENT OF THE CASE

A. Facts.

Respondent Richard Lee Pollard is a federal prisoner who was sentenced in 1996 to 20 years imprisonment for drug trafficking and firearms offenses. *See United States* v. *Pollard*, No. 95-CR-145 (E.D. Wash.). Since then, Pollard has been a "frequent filer" in the federal courts, having filed at least ten other civil actions in addition to this one.[1]

Pollard, originally appearing *pro se*, filed this action in 2001 when he was an inmate at the Taft Correctional Institution ("TCI") in California. At that time, TCI was operated by the Wackenhut Corrections Corporation, a non-governmental corporation that is now known as The GEO Group, Inc. Pollard's initial complaint was dismissed with leave to amend, and Pollard filed an amended complaint in 2002.

According to the amended complaint (whose facts are taken as true for purposes of this appeal) on

[1] *See Pollard* v. *Thomas*, No. 09-CV-726 (D. Ore.); *Pollard* v. *United States*, No. 04-CV-346 (E.D. Wash.); *Pollard* v. *United States*, No. 05-CV-00121 (E.D. Wash.); *Pollard* v. *United States*, No. 03-CV-386 (E.D. Wash.); *Pollard* v. *United States*, No. 02-CV-58 (E.D. Wash.); *Pollard* v. *United States*, No. 00-CV-72 (E.D. Wash.); *Pollard* v. *Hawk-Sawyer*, No. 00-CV-131 (D.D.C.); *Pollard* v. *United States*, No. 99-CV-3228 (D.D.C.); *Pollard* v. *U.S. Dep't of Justice*, No. 98-CV-00399 (E.D. Wash.); *Pollard* v. *United States*, No. 97-CV-78 (E.D. Wash.).

April 7, 2001, Pollard accidentally tripped over a cart outside the TCI butcher shop where he was working. App. 74a; *see generally* Am. Compl. (Dkt. 11, filed April 18, 2002). His arms were placed in a sling. App. 15a. After an x-ray, he was diagnosed with possible elbow fractures. *Id.*

Pollard was referred to an off-site orthopedic clinic. In preparation for his transfer, he was directed to put on a jumpsuit, which required putting his arms through his sleeves. *Id.* Pollard protested that this would cause him pain but was nevertheless required to put it on. During the transfer to the clinic, he was also required to wear a "black box" mechanical restraint device on his wrists notwithstanding complaints about pain. *Id.* He was diagnosed with injuries to his elbows, including fractures, and the examining physician recommended a splint. *Id.*

Upon returning to TCI, Pollard was told that he would not receive a splint due to staffing and facilities limitations. *Id.* Pollard alleges that, in the ensuing weeks, he was unable to carry a food tray, was not provided an alternative means to feed himself, and was unable to bathe himself. *Id.*; App. 75a. Pollard also alleges that he was required to return to work before his injuries had healed and was again required to wear the black box when returning to the outside clinic for a follow-up visit. App. 15a-16a.

B. Proceedings Below.

Pollard's amended complaint asserted damages claims against GEO and eight individual defendants (seven of whom were employees of GEO) alleging violation of his Eighth Amendment rights. App. 16a. Five of these GEO employees, petitioners Margaret

Minneci, Jonathan E. Akanno, Robert Spack, Bob D. Stiefer, and Becky Maness, remain parties to the case.[2]

Pursuant to 28 U.S.C. § 1915A(b)(1), which requires pre-screening of *pro se* prisoner complaints, a Magistrate Judge recommended that the amended complaint be dismissed. The Judge found that Pollard "has alternative and superior remedies available to him in state court." App. 79a. And relying on decisions of the Fourth and Tenth circuits, the Judge concluded that "extending *Bivens* would not provide Plaintiff with an otherwise nonexistent cause of action. Nor would extending *Bivens* deter future unconstitutional conduct by federal officers as the Defendants are employees of a private corporation. As such, the court finds that this case does not present circumstances warranting the extension of *Bivens*." App. 80a. After conducting a *de novo* review, the District Court adopted the Magistrate Judge's recommendation in full, and dismissed the case. *Id.* at 71a.

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[2] Defendant Marshall Lewis was an outside doctor employed by another company. App. 16a. He was never served with the complaint or notice of appeal and was therefore never a formal party in the District Court or the Court of Appeals. App. 17a n.6. Defendant Everett Uzzle died while this case was on appeal, *id.*, and his estate was never substituted as a party pursuant to Fed. R. App. P. 43(a). Defendant Raymond Andrews was not included in Pollard's appeal from the district court's judgment. *Id.* Because Dr. Lewis, Mr. Uzzle and Mr. Andrews were not parties to the proceedings in the Court of Appeals or named in that court's judgment reversing the dismissal of the complaint, the dismissal of the claims against them was not disturbed and they are not parties to this proceeding. *See* Sup. Ct. R. 12.6.

Pollard, by then represented by counsel, appealed, and a divided Ninth Circuit panel reversed as to the claims against the five GEO employees still in the case. Expressly rejecting the holdings of all other circuits to have considered the issue, the majority held that "Pollard's suit under *Bivens* against the GEO employees for alleged violations of his Eighth Amendment rights should be allowed to proceed" because (1) the GEO employees act "under color of federal law" for purposes of *Bivens* liability; and (2) "state tort remedies alone are insufficient to displace *Bivens* and there are no 'special factors counselling hesitation' in allowing Pollard's suit to proceed." *Id.* at 52a.

Judge Restani of the Court of International Trade, sitting by designation, dissented. She concluded that the majority erred in rejecting the holdings of the other circuits and that "[t]he evolution of the U.S. Supreme Court's *Bivens* jurisprudence confirms that this Court should follow their lead." *Id.* at 53a. In her view, "[t]he availability of a superior alternative remedy is a convincing reason for the Judicial Branch to refrain from providing a new, freestanding damages remedy." *Id.* at 55a. Therefore, she "would join with other circuits in concluding that a *Bivens* cause of action is not available against employees of privately-run prison corporations where, as here, state tort laws provide a remedy." *Id.* at 68a.

The panel denied rehearing (while amending its opinion in minor respects) and the full Ninth Circuit denied rehearing *en banc*. *Id.* at 2a-4a. Eight judges, however, dissented from denial of rehearing *en banc* in an opinion authored by Judge Bea. These judges concluded that the panel majority erred in rejecting the holdings of other circuits and in

"disregard[ing] the Supreme Court's narrowing instructions on *Bivens*," and that "such an unprecedented opinion demands further review." *Id.* at 5a. Subsequently, the Ninth Circuit stayed its mandate pending final resolution of this petition. *Id.* at 81a.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE SHARPLY DIVIDED ON THE QUESTION PRESENTED.

This is not a case where a conflict among the circuits must be inferred. The Ninth Circuit not only expressly recognized that its decision conflicted with the holdings of other circuits, but further noted that the conflict extended to two different aspects of the question presented. The Ninth Circuit held that (1) the GEO employees are considered federal actors for purposes of *Bivens* liability and (2) the availability of a state tort remedy does not foreclose redress under *Bivens*. App. 21a. It then stated that "[w]e recognize that the former holding directly conflicts with the Fourth Circuit's holding in *Holly* v. *Scott*, 434 F.3d 287, 294 (4th Cir. 2006), and the latter conflicts with both *Holly* and the Eleventh Circuit's holding in *Alba* v. *Montford*, 517 F.3d 1249, 1254 (11th Cir. 2008)." *Id.* *See also id.* at 22a (noting "our disagreement with our sister circuits"); *id.* at 31a (noting "the contrary holding of the Fourth Circuit").

Judge Restani also recognized the division, concluding that the panel erred by "creat[ing] a split in the law of the various circuits." *Id.* at 53a. Similarly, the rehearing dissenters identified the "irreconcilable conflict with the decisions of two federal circuits," stating that "[t]he facts of *Alba* and *Holly* are so similar to this case that the panel

majority does not even try to distinguish them," and that the panel's opinion "places this circuit in direct conflict with each of the other circuits to address the issue." *Id.* at 14a. As they stated, "[t]he panel majority's decision, by its own admission, creates a circuit split with the two courts of appeals which held, on indistinguishable facts, that alternative state remedies are sufficient, on their own, to preclude recognition of a *Bivens* claim." *Id.* at 11a.

Moreover, these dissenters noted that the majority also created an arguable conflict with the Tenth Circuit, a panel of which reached a contrary conclusion in *Peoples* v. *CCA Det. Ctrs.* ("*Peoples I*"), 422 F.3d 1090 (10th Cir. 2005). Although that opinion was later vacated when the *en banc* court divided evenly on the question, the panel decision in *Peoples* "is still another example of a federal court refusing to recognize a *Bivens* action in this area." App. 5a n.3. *See also Holz* v. *Terre Haute Reg. Hosp.*, 123 Fed. App'x 712, 713 (7th Cir. 2005) (affirming dismissal of inmate's *Bivens* claim against nurse employed by privately owned hospital, because a "*Bivens* claim cannot be brought against a private entity (or individual), even if it is a federal contractor").

1. In *Holly*, the Fourth Circuit faced the same question that is at issue in this case: "whether individual employees of a privately operated prison face Eighth Amendment liability under *Bivens* * * * and its progeny for allegedly providing inadequate medical care to a federal inmate." *Holly*, 434 F.3d at 288. Just as in this case, the individual defendants were employees of GEO. Yet unlike the Ninth Circuit, the Fourth Circuit (in an opinion authored by Judge Wilkinson) answered the question in the negative, holding that "[w]e decline to extend the

Bivens cause of action to these circumstances, both because the actions of the private prison employees are not fairly attributable to the federal government and because the inmate has adequate remedies under state law for his alleged injuries." *Id.*

The court found that these two "special factors" each "independently precludes the extension of *Bivens*." *Id.* at 290. As it noted, both governmental action and the lack of another legal remedy against individual defendants "represent critical justifications for the very existence of the *Bivens* doctrine," and "[t]o judicially infer a cause of action where these elements are absent would be to release that doctrine from its moorings and cast it adrift." *Id.*

a. The *Holly* court first held that the actions of employees of private prison contractors are "not of a sufficiently federal character" to foster liability under *Bivens*. *Id.* at 292. Such individuals are not federal officials, federal employees, or even independent contractors with the government. *Id.* Although "GEO, like a great many private corporations, does business under contract with the government," that "is not by itself enough to subject it to constitutional liability, let alone to create such liability for its individual private employees." *Id.* at 293 (citation omitted).

Noting the holding in *Richardson* v. *McKnight*, 521 U.S. 399, 405 (1997), that "correctional functions have never been exclusively public," the Fourth Circuit held that prison administration is not one of the narrow circumstances where the actions of private actors might give rise to *Bivens* liability. The court also distinguished this Court's decision in *West* v. *Atkins*, 487 U.S. 42 (1988), which held that a doctor employed by a state to provide medical services to inmates acted "under color of state law" for purposes

of liability under 42 U.S.C. § 1983 ("Section 1983"). As the court explained, a privately-run prison involves materially different circumstances from *West*, where "the state itself was directly responsible for managing the prison." *Holly*, 434 F.3d at 294.

The court also noted that *Richardson* further counseled against finding *Bivens* liability in this context. *Richardson* held that employees of private contractors operating state prisons, unlike their governmental counterparts, are not entitled to qualified immunity in actions brought under Section 1983. Accordingly, because the Fourth Circuit understood the scope of qualified immunity to be identical in Section 1983 and *Bivens* actions, *see Butz* v. *Economou*, 438 U.S. 478, 504 (1978), implying a *Bivens* cause of action against employees of private prison contractors would leave those individuals without the qualified immunity defense enjoyed by federal prison employees. As the court held, "[i]n the absence of statutory authority, we are reluctant to create an anomaly whereby private defendants face greater constitutional liability than public officials." *Holly*, 434 F.3d at 294.

b. The court also held that "a second independent factor" precluded recognition of a *Bivens* remedy against GEO employees: the fact that the plaintiff "possesses alternative—and arguably superior—causes of action against defendants, under the state law of negligence." *Id.* at 295. Because "[t]he dangers of overreaching in the creation of judicial remedies are particularly acute where such remedies are unnecessary," the court "decline[d] to invite such dangers by recognizing *Bivens* liability here." *Id.*

The Fourth Circuit noted that this Court has extended *Bivens* beyond its specific facts in only two

circumstances: where a plaintiff "lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct," and to "provide an otherwise non-existent cause of action against individual officers alleged to have acted unconstitutionally." *Malesko*, 534 U.S. at 70. The *Holly* court concluded that neither circumstance was present, because the plaintiff had an adequate alternative state law remedy. Noting that the plaintiff "already enjoys claims that an inmate in a government-run facility would not have," the court explained that "[i]n requesting that we also grant him a *Bivens* claim—indeed, that we grant him a superior one in which qualified immunity is unavailable—Holly seeks much more than is necessary to remedy his alleged injuries." *Holly*, 434 F.3d at 296-97.

c. Judge Motz concurred in the judgment. She disagreed with the panel majority's conclusion that the GEO employees were not federal actors for purposes of the *Bivens* analysis. But she agreed with the majority's holding that because the plaintiff "possesses an alternative remedy for his alleged injuries, no action under *Bivens* * * * lies in this case." *Id.* at 297 (Motz, J., concurring).

2. In *Alba*, the Eleventh Circuit likewise considered whether "a federal prisoner incarcerated in a privately operated prison may pursue a *Bivens* action against employees of the private prison for allegedly violating his Eighth Amendment right to medical treatment." 517 F.3d at 1251. Like the Fourth Circuit in *Holly* and unlike the Ninth Circuit here, the court answered the question in the negative.

The court assumed without deciding that employees of privately-operated federal prisons are government actors for purposes of *Bivens* liability.

Id. at 1254. But the court found no cause of action under *Bivens* because "alternative remedies exist by which [the plaintiff] can recover from the Defendants." *Id.* Like the Fourth Circuit, the Eleventh Circuit read this Court's decision in *Malesko* as holding that a *Bivens* remedy will be implied only where a cause of action is otherwise unavailable and the plaintiff lacks any alternative remedy for the harm alleged. *Id.*

The court rejected the plaintiff's contention that the alternative remedy must be a federal remedy, following the Fourth Circuit's reasoning in *Holly*. *See id.* ("At least one circuit court has acknowledged that the existence of a state remedy precludes recovery under *Bivens*.") (citing and quoting *Holly*, 434 F.3d at 296). And the court held that the available state law remedies were adequate, regardless of whether they might involve additional procedural requirements. *Alba*, 517 F.3d at 1255-56.

3. As noted above, the Ninth Circuit deliberately created a conflict with both the Fourth Circuit's decision in *Holly* and the Eleventh Circuit's decision in *Alba*.

Based on its reading of this Court's decision in *West*, *supra*, the panel majority rejected the Fourth Circuit's rationale that GEO employees are not federal actors for purposes of *Bivens* liability. Embracing Judge Motz's contrary view on that issue, the majority stated that "[t]he Fourth Circuit does not share our understanding of *West*," and held that "[w]e cannot subscribe to such an illogical reading of *West*." App. 27a. The court also expressly rejected the Fourth Circuit's reliance on *Richardson*. *Id.*

The court then proceeded to disagree with both the Fourth and Eleventh circuits as to whether the existence of other adequate remedies precludes implying a *Bivens* remedy. Without any finding that Pollard's alternative remedies would, in fact, have been inadequate to redress the harm he alleges, the court held that "the mere availability of a state law remedy does not counsel against allowing a *Bivens* cause of action." App. 35a. It held that "only remedies crafted by *Congress*," can preclude recognition of a *Bivens* remedy, and disagreed with the other circuits' holdings that "state tort law can preclude a *Bivens* remedy." *Id.* at 36a (citing *Alba*, 517 F.3d at 1253-55 and *Holly*, 434 F.3d at 295-97) (emphasis in original).

4. As the dissenters below concluded, the Ninth Circuit's decision is also in tension, if not direct conflict, with the Tenth Circuit's resolution of the issue. In *Peoples I*, *supra*, the court considered two companion cases brought by a federal inmate of a privately-operated prison. A panel of the Tenth Circuit reached the same conclusion later reached by the Fourth and Eleventh circuits—"that there is no implied private right of action for damages under *Bivens* against employees of a private prison for alleged constitutional deprivations when alternative state or federal causes of action for damages are available to the plaintiff." 422 F.3d at 1101.

The Tenth Circuit subsequently granted *en banc* rehearing. The *en banc* court concluded that subject matter jurisdiction existed and therefore reversed the judgment in one of the two cases because the judgment had been predicated on that ground. *Peoples* v. *CCA Det. Ctrs.* ("*Peoples II*"), 449 F.3d 1097, 1099 (10th Cir. 2006). But the court divided

evenly on the *Bivens* issue. *Id.* As a result, the judgment in the second case, which had been predicated on the lack of a *Bivens* remedy, was affirmed by an equally divided court. In light of that disposition, the district court on remand once again dismissed the first case on the same ground. *See* Dkt. 42 at 3, *Peoples* v. *CCA Det. Ctrs.*, No. 03-3129-KHV (D. Kan. 2006) ("Because plaintiff has a state court remedy, the Court can not imply a *Bivens* action.").

Although the panel opinion on the *Bivens* issue was vacated by the *en banc* court and lacks precedential value, *Peoples II*, 449 F.3d at 1099, the disposition of the Tenth Circuit on that issue—affirming the district court's dismissal for lack of a *Bivens* remedy—continues to govern in the Tenth Circuit, just as it did in *Peoples* itself on remand. Thus, in *Cohen* v. *Zaki*, No. 10-1309, 2011 WL 767160 (10th Cir. Jan. 4, 2011), the Tenth Circuit was urged, despite an apparent waiver, to consider "whether employees of a private corporation operating under a federal contract can be held liable in a *Bivens* action" but the court "held that "[w]e have already answered this question" in *Peoples*. *Id.* at *3 n.1. Thus, although there is no precedential opinion on the issue in the Tenth Circuit, that court's disposition in *Peoples* continues to govern future cases and conflicts with the Ninth Circuit's holding in this case. And in any event, the stalemate in the Tenth Circuit is another factor warranting this Court's intervention.

* * *

The Court has explained that a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals." *Braxton* v. *United States*, 500 U.S. 344,

347 (1991). The Court should do so here. The conflict is direct and intractable, and the present confusion in the law will persist unless this Court intervenes to resolve it.

II. THE NINTH CIRCUIT'S HOLDING CONFLICTS WITH THIS COURT'S PRECEDENTS.

Certiorari is also warranted because the Ninth Circuit's decision conflicts with this Court's precedents. As Judge Bea and his fellow dissenters noted, the panel's decision is a "marked * * * departure * * * from established precedent" that "disregards the Supreme Court's narrowing instructions on *Bivens*." App. 8a. Although this Court has not yet directly faced the question presented in this case, *see Malesko*, 534 U.S. at 65, the Ninth Circuit's decision conflicts with the central precepts of this Court's *Bivens* jurisprudence. By implying a federal cause of action against non-governmental officers notwithstanding the availability of adequate alternative remedies, the Ninth Circuit overstepped the narrow bounds set by this Court.

A. The Court Has Held That Adequate Alternative Remedies Preclude Recognition Of A *Bivens* Cause Of Action.

The Court has recognized *Bivens* remedies in only two cases other than *Bivens* itself, and since 1980 has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68.[3] *Cf. id.* at 75 (Scalia, J.,

[3] Since *Carlson* v. *Green*, 446 U.S. 14 (1980), the Court has declined to imply a *Bivens* remedy in every case it has considered. *See Wilkie* v. *Robbins*, 551 U.S. 537 (2007); *Malesko*, 534 U.S. 61 (2001); *FDIC* v. *Meyer*, 510 U.S. 471 (1994); *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988); *United States* v.

concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action" and prior cases should be limited "to the precise circumstances that they involved"); Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2007 Cato Sup. Ct. Rev. 23, 26 ("[T]he best that can be said of the *Bivens* doctrine is that it is on life support with little prospect of recovery."). And "[i]n its forty-year *Bivens* history, [this] Court has never provided a *Bivens* claim for relief to a person who—like the plaintiff in this case * * *—had adequate state tort remedies." App. 5a (Bea, J., dissenting). By manufacturing such a cause of action "for the first time in this country's history," the Ninth Circuit "extend[ed] *Bivens* far beyond its carefully prescribed contours." *Id.* at 13a-14a.

Lack of adequate alternative remedies has been the touchstone in all three cases in which this Court implied a *Bivens* remedy. In *Bivens* itself, the Court implied a cause of action to challenge an unlawful but consensual home search because state law would not have provided a remedy in light of the homeowner's consent. *Bivens*, 403 U.S. at 394. *See Malesko*, 434 U.S. at 73. "[A]bsent a right of action implied by the Court from the Constitution, Bivens would have had no means by which to vindicate his Fourth Amendment rights." App. 7a (Bea, J., dissenting). As Justice Harlan put it in his *Bivens* concurrence, "[f]or people in Bivens' shoes, it is damages or nothing." 403 U.S. at 410 (Harlan, J., concurring).

Stanley, 483 U.S. 669 (1987); *Chappell* v. *Wallace*, 462 U.S. 296 (1983); *Bush* v. *Lucas*, 462 U.S. 367 (1983); *see also Hui v. Castaneda*, 130 S. Ct. 1845 (2010).

Likewise, in *Davis* v. *Passman*, 442 U.S. 228 (1979), the Court implied a *Bivens* remedy for an employee suing a former congressman for sex discrimination because neither state nor federal law would have afforded her any relief. As the Court explained, "there are available no other alternative forms of judicial relief. For Davis, as for Bivens, 'it is damages or nothing.'" *Id.* at 245 (citation omitted). *See Malesko*, 534 U.S. at 67 ("In *Davis*, we inferred a new right of action chiefly because the plaintiff lacked any other remedy for the alleged constitutional deprivation."). Like Bivens, Davis was "a plaintiff in search of a remedy." *Id.* at 74. In both cases, "the plaintiffs' injuries would have gone entirely unredressed without an implied constitutional remedy." *Holly*, 434 F.3d at 295.

Finally, in *Carlson*, the Court implied a *Bivens* remedy for the administratrix of a deceased prisoner against federal prison officials, where state law allowed no recovery for pain and suffering and the Federal Tort Claims Act precluded a claim against the individual defendants. 446 U.S. at 23. Thus, in *Carlson*, the plaintiff sought "a cause of action against an individual officer [that was] otherwise lacking." *Malesko*, 534 U.S. at 74.

As this Court has summarized, *Bivens* claims were authorized in these cases because "Davis had no other remedy, Bivens himself was not thought to have an effective one, and in *Carlson* the plaintiff had none against Government officials." *Wilkie*, 551 U.S. at 555. Here, by contrast, Pollard had an adequate state law tort remedy against the individual defendants. *See* App. at 11a (Restani, J., dissenting) ("The plaintiff has not shown—because he cannot—that there is any state which does not provide

recovery for that most fundamental tort claim, in which one person's negligent conduct causes physical and/or emotional harm to another."). Indeed, the state law remedy is "actually superior to any presumed action he would have under *Bivens*," because of the onerous legal standard under the Eighth Amendment. *Id.* at 10a (Bea, J., dissenting). *Bivens* claims "were created for the situation in which the plaintiff had no other means of vindicating his constitutional rights in either state or federal court; that policy concern simply does not apply to a case, such as here, where adequate state tort remedies exist." *Id.*

In 2007, the Court distilled its *Bivens* jurisprudence into a two-part test. The first question is "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, 551 U.S. at 550. But "even in the absence of an alternative," the Court will still refuse to imply a remedy if there are "special factors counseling hesitation before authorizing a new kind of federal litigation." *Id.* Here, the inquiry founders at the first stage. By creating a new and freestanding federal cause of action even though there is concededly an "alternative, existing process for protecting the interest," *id.*, the Ninth Circuit placed itself in conflict with this Court's precedents. As with the plaintiff in *Wilkie*, Pollard's "situation does not call for creating a constitutional cause of action for want of other means of vindication." *Id.* at 555.

Contrary to the Ninth Circuit's view, that an alternative remedy exists under state rather than federal law or might have different procedural

requirements than a *Bivens* claim has never been license for a court to imply a federal cause of action. *See Alba*, 517 F.3d at 1255; *Peoples I*, 422 F.3d at 1104-05; App. 55a-56a (Restani, J., dissenting); *id.* at 12a-13a (Bea, J., dissenting). Because Congress, unlike unelected judges, is well-suited to the task of determining appropriate remedies for violation of federal rights, "neither the absence nor the incompleteness of such a scheme represents an invitation for a court to step in to correct what it may perceive as an injustice toward an individual litigant." *Holly*, 434 F.3d at 290.

"So long as the plaintiff ha[s] an avenue for some redress, bedrock principles of separation of powers foreclose[] judicial imposition of a new substantive liability." *Malesko*, 534 U.S. at 69. Thus, the Court has authorized new *Bivens* remedies in only two circumstances: "to provide an otherwise non-existent cause of action" and to "provide a cause of action for a plaintiff who lacked any alternative remedy." *Id.* at 70. Neither circumstance is present in this case. The Ninth Circuit's disregard of the stringent limitations this Court has placed on the creation of new *Bivens* remedies warrants this Court's review.

B. The Court's Precedents Do Not Permit Extending *Bivens* To Employees Of A Private Contractor.

Review is also warranted because the Ninth Circuit extended *Bivens* to a brand-new area not authorized by this Court's precedents: claims against private citizens who are not federal officers but are employees of a private entity that contracts with the federal government. It imposed, by judicial fiat, new liability on such employees who—unlike actual federal officers—lack a recognized qualified immunity

defense, and whom Congress has expressly excluded as federal actors for purposes of tort liability. This drastic and unauthorized departure from this Court's precedents should not stand unreviewed.

Whatever the scope of *Bivens* in its prescribed sphere, it provides only "a private cause of action for damages against *a federal official*." *Bush*, 462 U.S. at 374 (emphasis added). *See Malesko*, 534 U.S. at 70 (purpose of *Bivens* is "to deter individual *federal officers* from committing constitutional violations") (emphasis added). Petitioners are not federal officials or federal officers. During the events at issue, they were employees of GEO, a private company that contracted with the federal government to provide certain services. They were not employed by, and did not contract with, the government. They are accordingly outside the scope of the *Bivens* doctrine as this Court has defined it. And at a bare minimum, petitioners' status as private employees is a "special factor[] counseling hesitation before authorizing a new kind of federal litigation." *Wilkie*, 551 U.S. at 550.

"The presence or absence of congressional authorization for suits against federal officials is, of course, relevant to the question whether to infer a right of action for damages for a particular violation of the Constitution." *Butz*, 438 U.S. at 504. [4] And congressional intent becomes determinative where, as here, courts are asked to imply a remedy against private contractors that is more expansive than that

[4] *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 52 (1985) (before recognizing *Bivens*-type remedy, courts should "first determine whether Congress or the framers specifically intended to create a federal right enforceable by judicial action").

authorized for their governmental counterparts. In *Malesko*, the Court declined to imply a *Bivens* action against corporate contractors that was unavailable against their government agency counterparts, holding that "[w]hether it makes sense to impose asymmetrical liability costs on private prison facilities alone *is a question for Congress, not us, to decide*." *Malesko*, 534 U.S. at 72 (emphasis added).

Just as in *Malesko*, implying a *Bivens* remedy here would impose asymmetrical liability costs that raise a policy question for Congress, not courts, to resolve. That is so for at least two basic reasons.

1. *First*, unlike actual federal officials, individual employees of private prisoner contractors have no recognized qualified immunity defense. In *Richardson*, *supra*, this Court held that employees of private prison management firms that contract with state and local governments have no qualified immunity from constitutional claims brought under Section 1983. The Court so held because "[h]istory does not reveal a 'firmly rooted' tradition of immunity applicable to privately employed prison guards," given that "correctional functions have never been exclusively public." 521 U.S. at 404-05. Thus, qualified immunity did not apply to employees of "a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, [which] undertakes that task for profit and potentially in competition with other firms." *Id.* at 413. And in *Butz*, 438 U.S. at 504, the Court held that "without congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under

§ 1983 and suits brought directly under the Constitution against federal officials."

The Ninth Circuit's judicially-manufactured *Bivens* remedy therefore subjects employees of private prison contractors, unlike federal officers, to liability for constitutional torts without a recognized qualified immunity defense for actions taken in good faith. Qualified immunity "permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time-consuming preparation to defend the suit on its merits." *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991). Its purpose "is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Id.*

Accordingly, if the Ninth Circuit's ruling is allowed to stand, petitioners and other employees of private government contractors—unlike actual government employees—will face potentially crippling personal liability and legal costs without a recognized qualified immunity defense, even when they act in good faith. As the Court held in *Malesko*, imposing these "asymmetrical liability costs" on private employees "is a question for Congress, not us, to decide." 534 U.S. at 72. *See Holly*, 434 F.3d at 294 ("In the absence of statutory authority, we are reluctant to create an anomaly whereby private defendants face greater constitutional liability than public officials.") (citing *Malesko*, 534 U.S. at 71-72). The Ninth Circuit's disregard of this Court's directions warrants certiorari.

2. *Second*, the Ninth Circuit ignored clear Congressional intent that employees of federal contractors should *not* be treated the same as actual

federal officers for purposes of liability for torts committed in the scope of their employment, which undercuts any perceived rationale for extending *Bivens* to actions like this one.

The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, creates an exclusive remedy against the United States for torts committed by federal employees in the scope of their employment, pre-empting state law causes of action against the individuals. Given that the individuals themselves could not be sued for such claims, the Court held in *Carlson* that a *Bivens* remedy was appropriate. *See Carlson*, 446 U.S. at 21 ("Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States."). The Court also noted that Congress had expressly approved of constitutional claims against federal employees. *Id.* at 19-20. *See also* 28 U.S.C. 2679(b)(2) (preserving constitutional claims "against an employee of the Government").

With regard to employees of government contractors, however, Congress has expressed the opposite intent. Whereas the FTCA defines government employees to include officers and employees of any federal agency, it expressly *excludes* employees of "any contractor with the United States." 28 U.S.C. § 2671. This exclusion encompasses prison contractors. *Logue* v. *United States*, 412 U.S. 521, 526-27 (1973). Excluding employees of contractors from the definition of government employees was an express decision by Congress. Congress "could have left the determination as to whose negligence the Government should be liable for under the [FTCA] to the law of the State involved, as it did with other aspects of liability under the Act" but "chose not to

do this, and instead incorporated into the definitions of the Act the exemption from liability for injury caused by employees of a contractor." *Id.* at 528.

Accordingly, *Carlson*'s rationale for implying a *Bivens* remedy against federal employees is absent for employees of contractors. Without a *Bivens* remedy, those with claims against federal employees would be relegated to an exclusive FTCA remedy that the Court in *Carlson* viewed as inadequate. But as Congress determined, that is not the case for those with claims against employees of federal contractors, who retain state law remedies. As the Fourth Circuit held in *Holly*, "[a]pplication of *Bivens* to private individuals simply does not find legislative sanction." 434 F.3d at 292.

The Ninth Circuit was nevertheless determined to invent a new cause of action based on its view that GEO employees are "acting under color of federal law." App. 22a. Such an expansion of liability, however, is for Congress, not the courts, to prescribe. Congress has, by statute and for particular policy reasons, extended damages liability to those acting under color of *state* law. *See* 42 U.S.C. §§ 1981, 1983. But Congress has not done so with regard to those acting under color of *federal* law. Indeed, Congress knows full well how to extend laws to non-governmental individuals acting under color of federal law, including in the prison context. In the Religious Land Use and Institutionalized Persons Act, Congress defined the term "government" to include "any other person acting under color of Federal law," but only for narrow purposes not including the cause of action itself. *See* 42 U.S.C. § 2000cc-5(4)(B). *See also, e.g.*, 18 U.S.C. § 242 (criminalizing certain acts taken "under color of any law"). Yet Congress took

the opposite approach in the FTCA, excluding contractor employees from coverage.

As the Fourth Circuit explained in *Holly*, this Court's "repeated reluctance to extend *Bivens* is not without good reason" because "[a] *Bivens* cause of action is implied without any express congressional authority whatsoever." 434 F.3d at 289. Unlike courts, "Congress possesses a variety of structural advantages that render it better suited for remedial determinations in cases such as this." *Id.* at 290. The Ninth Circuit stood these admonitions on their head, implying a *Bivens* remedy against private individuals even though every indicia of congressional intent is to the contrary. Such an unprecedented exercise of judicial lawmaking warrants this Court's intervention.

III. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT, AND THIS CASE IS AN IDEAL VEHICLE FOR DECIDING IT.

A. The Question Is Recurring.

In addition to the conflicts the Ninth Circuit has created with other circuits and this Court's precedents on an important issue, certiorari is warranted because this case raises a "recurring question on which courts of appeals have divided," *Clay* v. *United States*, 537 U.S. 522, 524 (2003), and "a considerable number of suits are pending in the lower courts which will turn on the resolution of these issues." *Massachusetts Trs. of E. Gas & Fuel Assocs.* v. *United States*, 377 U.S. 235, 237 (1964).

In addition to the appellate cases discussed above, numerous district courts in other circuits have considered whether to extend *Bivens* to employees of

private prison management companies, and they, like their appellate counterparts, are divided. Many have dismissed such claims.[5] But others have not.[6] Moreover, the issue is not limited to the detention context, but extends more broadly to claims against other federal government contractors.[7]

This recurrence is not surprising, given that *Bivens* claims are a significant component of the federal courts' dockets. A recent study of claims filed in five

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[5] *See, e.g., Baez* v. *Cornell Cos., Inc.*, -- F. Supp. 2d --, No. 3:10-24, 2010 WL 5648572, *3 (W.D. Pa. 2010); *Fabian* v. *Dunn*, -- F. Supp. 2d --, No. SA-08-cv-269-XR, 2009 WL 2461207, *5 (W.D. Tex. 2009); *Lindsey* v. *Corr. Corp. of Am.* ("CCA"), -- F. Supp. 2d --, No. 07-3067-EFM, 2009 WL 2703691, *7 (D. Kan. 2009); *Hernandez-Chavez* v. *CCA*, No. 07-3198-SAC, 2009 WL 1689304, *3 (D. Kan. 2009); *Guillen* v. *Zenk*, No. 07-245J, 2008 WL 5416427, *2 (W.D. Pa. 2008); *Solesbee* v. *Nation*, No. 3:06-CV-0333-D, 2008 WL 244343, *10-11 (N.D. Tex. 2008); *Menteer* v. *Applebee*, No. 04-3054-MLB, 2008 WL 2649504, *10 (D. Kan. 2008); *Hall* v. *CCA*, No. 06-3090-SAC, 2008 WL 53666, *5 (D. Kan. 2008); *Longmire* v. *Carroll*, No. 3-06-CV-1503-P, 2006 WL 3542707, *2 (N.D. Tex. 2006); *Lawson* v. *Liburdi*, 114 F. Supp. 2d 31, 37 (D.R.I. 2000).

[6] *See, e.g., Bromfield* v. *McBurney*, No. C07-5226RBL-KLS, 2008 WL 2746289, *13-18 (W.D. Wash. 2008); *Purkey* v. *CCA Detention Ctr.*, 339 F. Supp. 2d 1145, 1148-51 (D. Kan. 2004); *Jama* v. *INS*, 343 F. Supp. 2d 338, 363 (D.N.J. 2004); *Sarro* v. *Cornell Corr., Inc.*, 248 F. Supp. 2d 52, 59-62 (D.R.I. 2003).

[7] *See, e.g., Lownsberry* v. *Lees*, -- F. Supp. 2d --, No. 06-13602, 2008 WL 4852791, *17 (E.D. Mich. 2008) (dismissing *Bivens* claims against employee of corporation managing Head Start program); *Bender* v. *GSA*, 539 F. Supp. 2d 702, 711-12 (S.D.N.Y. 2008) (denying motion to dismiss *Bivens* claim against contractor security guard for Social Security Administration officials); *Allen* v. *Travis*, No. 3:06-CV-1361-M (BH), 2008 WL 4602734, *3 (N.D. Tex. 2008) (denying motion to dismiss *Bivens* claim against employee of private security firm deputized as U.S. Marshal).

federal judicial districts found that *Bivens* claims constituted 1.2% of the total federal question filings in 2009. *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 Stan. L. Rev. 809, 835 (2010). When extrapolated nationwide, this amounts to more than 1,600 *Bivens* cases per year and nearly 19,000 filed in the past decade.[8] Many, like this case, crowd the dockets for years.

And if the Ninth Circuit's decision is allowed to stand, these numbers will only increase. About half of *Bivens* claims are brought against prison personnel.[9] If *Bivens* suits are authorized against employees of private prisoner operators, that number will rise significantly. Presently, the Federal Bureau of Prisons ("BOP") houses prisoners in 14 privately-run secure facilities in eight states. *See* BOP, *Weekly Population Report* (Feb. 17, 2011) (www.bop.gov/locations/weekly_report.jsp#contract). Between 2000 and 2009, the number of BOP prisoners in private facilities (secure and non-secure) rose from 15,524 to 34,087, with the latter number constituting 16.4% of all federal prisoners. *See* Bureau of Justice Statistics, *Prisoners in 2009* (Dec. 2010) (App'x

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[8] For the year ending September 2009, there were 136,041 federal question filings nationwide. *See* Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts* 152 (2009) (Table C-2). From 1999-2009, there were 1,578,305 federal question filings. *Id.* (series 1999-2009, Tables C-2). Extrapolating the study's findings yields 1,632 *Bivens* filings nationwide in 2009 and 18,940 for the decade.

[9] *See* Reinert, *supra*, at 837 (Table 2). From 1992-94, 1,513 *Bivens* claims were filed against Bureau of Prison officials. *See* Br. for United States, *Kimberlin* v. *Quinlan*, 515 U.S. 321 (No. 93-2068) (www.usdoj.gov/osg/briefs/1993/w932068w.txt).

Tables 19 & 20) (bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf). These statistics, moreover, do not include the many people held by other federal agencies that also contract with private facilities to house detainees.[10]

Prisoner *Bivens* litigation is already inundating the federal courts, and the Ninth Circuit's dramatic expansion of liability, combined with the increasing prevalence of private prison contractors, will only ensure that such litigation increases. Indeed, like many prisoners, Pollard is not shy about instituting litigation to vindicate his perceived rights, as he has filed at least ten other federal actions in addition to this one. *See supra* note 1. Moreover, unlike normal *Bivens* claims, many of the cases now authorized by the Ninth Circuit would not ordinarily be brought in federal court. When a *Bivens* claim is brought against a federal employee, it will often be combined with an FTCA claim for which federal jurisdiction also exists. *See, e.g.*, *Hui*, 135 S. Ct. at 1848. But absent diversity of citizenship, the normal forum for claims like Pollard's would be state court. And if no qualified immunity defense exists, many cases against private employees will linger on the dockets far longer than normal *Bivens* claims.

B. The Question Is Squarely Presented Here And There Are Often Impediments To Appellate Review In Other Cases.

In this case, the question presented was squarely faced and resolved by the District Court and the

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[10] These include Immigration and Customs Enforcement, the Office of Refugee Resettlement, the Bureau of Indian Affairs, the U.S. Marshals Service, the Department of Defense, and the Office of the Federal Detention Trustee.

Ninth Circuit, and is dispositive of the entire case. But while the issue is oft-recurring in the lower courts, there are often impediments to appellate review of it in other cases. Accordingly, given the intractable conflict in the circuits, this Court should not pass up this ideal opportunity to decide the question and restore certainty to the law.

It would be very difficult for the issue to make its way to this Court from the Ninth Circuit in a future case. District courts in that circuit are now bound to let *Bivens* claims go to trial if they are otherwise cognizable. Thus, the issue would likely not recur in the Ninth Circuit unless (1) the plaintiff secures a favorable final judgment after a trial; (2) the defendant preserves the *Bivens* issue for appellate review; and (3) the judgment is not reversed on other grounds. In other cases, including those settled before trial, the defendant would have no realistic opportunity to raise the issue on appeal.[11]

There are impediments to review in other circuits as well. If a district court denies a motion to dismiss, the defendant would face the same impediments just noted. The defendant could try to seek interlocutory certification, *see, e.g.*, *Holly*, 434 F.3d at 288, but that would be wholly discretionary with both the trial court and the court of appeals. *See* 28 U.S.C. § 1292(b). Even if the district court dismisses the *Bivens* claims, impediments to appellate review

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[11] It is unlikely the issue would arise if a defendant prevails in the trial court on other grounds. If the plaintiff appeals, the defendant could conceivably attempt to preserve the issue in the Ninth Circuit as an alternative basis for affirmance, but the plaintiff would have to prevail on appeal for the issue to be cognizable in this Court. And in that event, there would likely be other issues that would complicate this Court's review.

would still exist. If only *Bivens* claims were asserted, the plaintiff would still have to elect an appeal. But as occurs in cases against federal employees, where plaintiffs typically assert both *Bivens* and FTCA claims, *see Hui*, 135 S. Ct. at 1848, many plaintiffs suing private employees can be expected to assert *Bivens* claims along with state law claims. If so, dismissal of the *Bivens* claims could not be appealed until after final judgment on the other claims (absent interlocutory certification). *See* 28 U.S.C. § 1291. If the defendant prevails on additional grounds applicable to all claims, however, the *Bivens* issue would not be independently appealable.

And whether or not *Bivens* claims are dismissed, other complicating factors may often prevent the issue from cleanly arriving at this Court after final judgment. Most notably, many claims will settle before final judgment regardless of their merits, and the *in terrorem* effect of *Bivens* claims brought against private individuals without recognized qualified immunity defenses could well influence such settlements. *See* Reinert, *supra*, at 812-13 n.13, 837 (noting that *Bivens* claims are more successful than previously thought, with success including a settlement or voluntary dismissal). Indeed, cases where *Bivens* claims against private employees have survived dismissal motions have not proceeded to final judgments that could be appealed.[12]

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[12] After the decision in *Sarro*, 248 F. Supp. 2d at 60-62, the plaintiff dismissed his claims, likely pursuant to settlement. *See Sarro* v. *Cornell Corr., Inc.*, Dkt. 57, No. 00-011-T (D.R.I. 2003). After the decision in *Jama*, 343 F. Supp. 2d at 363, the case was tried but the *Bivens* claim was not submitted to the jury. *See Jama* v. *INS*, Dkt. 531, No. 97-3093(DRD) (D.N.J. 2007). After the decision in *Bender*, 539 F. Supp. 2d 702, the

Finally, if a future case does beat these odds and winds its way to this Court, it is unlikely to present the same clean vehicle for deciding the issue on which the circuits are squarely divided. The issue presented for review here was the sole and dispositive basis for decision in both the District Court and the court below, and there were no alternative grounds. It was posed unambiguously, and decided by the Ninth Circuit in a manner self-consciously in conflict with other circuits. The mandate has been stayed pending this Court's review, thereby precluding further substantive trial court proceedings. And there is no reason why the question would benefit from further consideration in the lower courts, a point resoundingly reinforced by the pointed dissents below. The Court should therefore grant review in order to bring certainty to the law.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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plaintiff withdrew her claims, likely pursuant to settlement. *See Bender* v. *GSA*, Dkt. 159, No. 05 Civ. 6459 (S.D.N.Y. 2009).

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD LEE POLLARD *Plaintiff-Appellant*, v. THE GEO GROUP, INC., Erroneously Sued as WACKENHUT CORRECTIONS CORPORATION, dba Taft Correctional Institution; MARGARET MINNECI; JONATHAN E. AKANNO; ROBERT SPACK; BOB D. STEIFER, BECKY MANESS, *Defendants-Appellees.*	No. 07-16112 D.C. No. CV-01-06078-OWW(WMW) ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Argued and Submitted
October 7, 2009—San Francisco, California

Filed June 7, 2010
Amended December 10, 2010

Before: Procter Hug, Jr. and Richard A. Paez, Circuit Judges, and Jane A. Restani,* Judge.

Order;
Dissent to Order by Judge Bea;
Opinion by Judge Paez;
Partial Concurrence and Partial Dissent by Judge Restani

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* The Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

COUNSEL

John F. Preis, University of Richmond School of Law, Richmond, Virginia, and Charles Francis Carbone, San Francisco, California, for the plaintiff-appellant.

Michael Kenneth Johnson, Lewis, Brisbois, Bisgaard & Smith, LLP, San Francisco, California, for defendants-appellees Wackenhut/The GEO Group, Inc., Margaret Minneci, Robert Spack, Bob D. Steifer, and Becky Maness.

David J. Wilson, Manning & Marder Kass Ellrod Ramirez LLP, Los Angeles, California, for defendant-appellee Jonathan E. Akanno.

ORDER

The majority opinion is amended as follows:

1. At slip op. 8168, n.15, 607 F.3d at 597 n.15, the final sentence of the footnote is amended to read: <Furthermore, as discussed above, Malesko also relied on the fact that the plaintiff was not seeking recovery against an individual officer. *See id.* at 73-74, 122 S.Ct. 515.>

2. At slip op. 8177, 607 F.3d at 602, the following sentence <Unfortunately, under the current Bivens regime, asymmetries will remain irrespective of whether we recognize or deny a *Bivens* cause of action here.> is amended to read: <Unfortunately, under the current *Bivens* regime, asymmetries may remain irrespective of whether we recognize or deny a *Bivens* cause of action here.>

3. At slip op. 8177, 607 F.3d at 602, the paragraph beginning <Unlike officers employed . . .> is amended to read: <Unlike officers employed by public prisons, the GEO employees may not be

entitled to qualified immunity, and as a result, prisoners asserting claims against them may be able to recover more often than their counterparts in governmentally run prisons. *Compare Richardson*, 521 U.S. at 401 (holding that employees of privately operated state prisons are not entitled to qualified immunity), *with Butz v. Economou*, 438 U.S. 478, 501 (1978) (holding that "federal officials should enjoy no greater zone of protection when they violate federal constitutional rules than do state officers" (emphases removed)), *and Holly*, 434 F.3d at 294 (stating that employees of privately operated federal prisons are not entitled to qualified immunity). We need not decide the issue of qualified immunity here.>

The dissenting opinion is amended as follows:

At slip op. 8191, 607 F.3d at 611, in the last textual sentence before the Conclusion, the phrase <are not entitled to qualified immunity> is amended to read: <may not be entitled to qualified immunity>

The amended opinion and amended dissent are filed concurrently with this order.

With those amendments, Judges Hug and Paez voted to deny the petition for panel rehearing. Judge Restani voted to grant the petition for panel rehearing.

The petition for panel rehearing is DENIED.

Judge Paez voted to deny the petition for rehearing en banc and Judge Hug so recommended. Judge Restani recommended that the petition for rehearing en banc be granted. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the

nonrecused active judges in favor of en banc reconsideration. FED. R. APP. P. 35.

The petition for rehearing en banc is DENIED.

BEA, Circuit Judge, dissenting from the denial of rehearing en banc, joined by KOZINSKI, Chief Judge, and O'SCANNLAIN, GOULD, TALLMAN, CALLAHAN, IKUTA, and N.R. SMITH, Circuit Judges:

The panel majority—over a vigorous dissent by Chief Judge Restani of the Court of International Trade—extends and grants a *Bivens*[1] claim to a prisoner against private company prison guards who are unprotected by notions of qualified immunity, available only to government employees.[2] It does so for personal injury claims between California litigants, for acts and omissions which took place in California, and for which California tort law provides adequate remedies through compensatory and punitive damages. In doing so, the panel majority frankly admits its opinion creates an irreconcilable conflict with the decisions of two federal circuits, the

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[1] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), is an extraordinary precedent that gives a party harmed by constitutional error a remedy against federal officials in a way that parallels the § 1983 remedy against state actors. *See Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006).

[2] *See Richardson v. McKnight*, 521 U.S. 399, 401 (1997) (holding that employees of a private prison management firm are not entitled to qualified immunity from suit by prisoners charging a violation of 42 U.S.C. § 1983).

Fourth and Eleventh.[3] Further, it disregards the Supreme Court's narrowing instructions on *Bivens*, which have limited recognition of new *Bivens* actions to those situations where, for one reason or another, damages were unavailable under both state and federal law. Because such an unprecedented opinion demands further review, I respectfully dissent from the denial of rehearing en banc.

I. The panel majority erred in unjustifiably recognizing a new *Bivens* action where adequate, and arguably superior, state remedies exist.

In its forty-year *Bivens* history, the Supreme Court has never provided a *Bivens* claim for relief to a person who—like the plaintiff in this case, Richard Lee Pollard—had adequate state tort remedies.[4] In

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[3] And arguably a third. In *Peoples v. CCA Det. Ctrs.*, 422 F.3d 1090 (10th Cir. 2005), the Tenth Circuit refused to recognize a *Bivens* action brought by a federal prisoner against individual employees of a privately operated pretrial detention center because "state or federal law afford[ed] the prisoner an alternative cause of action for damages for the alleged injury." *Peoples*, 422 F.3d at 1108. The case was reheard en banc by the Tenth Circuit, and an evenly divided panel affirmed the district court's dismissal of the complaint, based on the existence of plaintiff 's alternative remedy under state negligence law. *Peoples v. CCA Det. Ctrs.*, 449 F.3d 1097 (10th Cir. 2006) (en banc) (per curiam). Thus, while the case carries no affirmative precedential value, it is still another example of a federal court refusing to recognize a *Bivens* action in this area.

[4] Pollard brought a *Bivens* action against seven employees of the GEO Group Inc., a private corporation that operates, under contract with the Bureau of Prisons, the federal prison in which Pollard was incarcerated. Pollard alleged that GEO employees violated his Eighth Amendment rights when, after sustaining injuries to both elbows in an accident in which defendants played no part, he was directed to put on a jumpsuit and wear a

its most recent consideration of whether to extend *Bivens*, the Court distilled four decades of jurisprudence into a two-part test:

> [T]he decision whether to recognize a *Bivens* remedy may require two steps. In the first place, there is the question whether *any* alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation.

Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (emphasis added) (citation and internal quotation marks omitted).

A look at the three cases in which the Supreme Court has allowed a *Bivens* recovery reveals the emphasis the Court, and in turn, our sister circuits, have placed on the requirement that there be a lack of alternative state common law or statutory remedies. The Court has recognized two, and only two, contexts that permit recovery under *Bivens*: "to provide an otherwise nonexistent cause of action against individual [federal] officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative*

"black box" mechanical restraint device on his wrists, and was not provided with assistance to feed or bathe himself—all of which caused him pain and discomfort, but no residual injuries.

remedy for harms caused by an individual [federal] officer's unconstitutional conduct." *Corr. Serv. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). Neither circumstance is present in this case.

In *Bivens*, the Court created an implied cause of action for the homeowner for a warrantless, but consensual, entry and a nonconsensual search of his apartment, in violation of his Fourth Amendment rights. The drug agents' alleged conduct was egregious; they manacled the plaintiff in front of his wife and children, searched his entire apartment, and threatened to arrest his entire family. *Bivens*, 403 U.S. at 389. However, the Court noted that, since Bivens consented to the federal agents entering his home, his act precluded a state tort claim for trespass. *Id.* at 394. Thus, absent a right of action implied by the Court from the Constitution, Bivens would have had no means by which to vindicate his Fourth Amendment rights against unreasonable searches and seizures by recovery of damages, and through recovery of damages to deter the individual officers from engaging in such egregious conduct in the future.[5]

Next, in *Davis v. Passman*, 442 U.S. 228 (1979), the Court created an implied cause of action under the Fifth Amendment for a female office worker who alleged gender discrimination while working for Congressman Otto Passman of Louisiana. The Court noted that the plaintiff had no cause of action under Louisiana law for gender discrimination, and because the defendant was no longer in office,

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[5] *Bivens* was not charged with a crime, thus, suppression of the evidence at a criminal trial was not available as a deterrent against such police conduct.

injunctive relief against the ex-Congressman would have been futile. *Id.* at 245. Given the need for "an otherwise nonexistent cause of action," *Malesko*, 534 U.S. at 70, the Court created an implied cause of action for monetary relief. *Davis*, 442 U.S. at 248.

The last, and most recent, application of *Bivens* liability before the Court occurred thirty years ago in *Carlson v. Green*, 446 U.S. 14 (1980). In *Carlson*, the administratrix of the estate of a deceased federal prisoner brought an action alleging that prison officials had violated the prisoner's Eighth Amendment rights by exhibiting deliberate indifference to the prisoner's serious medical needs—precisely the claims made here by Pollard. The prisoner was alleged to have died as a result. Under Indiana's tort law, the prisoner's cause of action for his pain and suffering did not survive his death. Hence, the administratrix had no legally protected interest to be harmed, and thus, no standing to sue on behalf of decedent's estate. In light of the deterrence rationale in *Bivens*, the Court found an implied cause of action, which provided the only avenue to vindicate the decedent's rights to damages against the individual tortfeasors.[6] *Id.* at 23.

The facts of these cases show how marked a departure is the panel majority's opinion from established precedent.[7] Unlike *Bivens*, *Davis*, and

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[6] Under the Federal Tort Claims Act, only the United States could be sued, not the individual federal agents.

[7] The Supreme Court has also declined to imply a *Bivens* cause of action in new circumstances not directly related to the existence of alternative state remedies. *See Malesko*, 534 U.S. at 74 (holding that *Bivens* liability does not extend to a corporate entity because the deterrence rationale applies only to individual actors); *Wilkie*, 551 U.S. at 562 (denying *Bivens*

Carlson, where the plaintiffs had no existing cause of action and no alternative state remedy, Pollard has a viable suit in state court against each of the jailor defendants under theories of intentional or negligent tort or medical malpractice. California law imposes an affirmative duty of care on jailers:

> One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of his normal opportunities for protection is under . . . a duty to take reasonable action to protect them against unreasonable risk of physical harm.

Rest. (2d) Torts § 314A, *see also Delgado v. Trax Bar & Grill*, 113 P.3d 1159, 1165 n.14 (Cal. 2005) (citing provision with approval).

To recover compensatory damages under California law, Pollard need prove only the individual defendants breached this affirmative duty, and that the breach caused him physical or emotional harm. Additionally, punitive damages are available in an ordinary negligence or medical malpractice action where plaintiff proves defendant acted with "malice" or "extreme indifference to the plaintiff 's rights." *Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co.*, 230 Cal. Rptr. 276, 278-79 (Cal. Ct. App. 1986).

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claim due to the "difficulty of devising a workable cause of action" to remedy plaintiff 's grievances, which included allegations of trespass and extortion by Bureau of Land Management officials, retaliatory prosecution for his refusal to grant the Bureau an easement on his ranch, and unauthorized survey of his land by Bureau employees).

In at least one respect, Pollard's remedy under state law against both jailers and doctors is actually superior to any presumed action he would have under *Bivens*. A *Bivens* plaintiff must prove the defendants acted with "deliberate indifference." *Estelle v. Gamble*, 429 U.S. 97, 105 (1976). But, in a negligence claim, a plaintiff need establish only that the jailers breached their affirmative duty of providing reasonable care. Thus, unlike the few cases in which the Court has recognized a *Bivens* action, Pollard already has a state forum in which to remedy the alleged unconstitutional conduct—with a lesser showing of culpability required, no less. *Bivens* claims were created for the situation in which the plaintiff had no other means of vindicating his constitutional rights in either state or federal court; that policy concern simply does not apply to a case, such as here, where adequate state tort remedies exist.

The panel majority invokes the abstract claim of "lack of uniformity" as a reason to support its assertion that the existence of state tort remedies cannot, on its own, preclude recognition of a new *Bivens* action. But "lack of uniformity" has been a significant part of the Court's analysis only when the plaintiff has shown that he is barred from bringing suit for the alleged constitutional violation in one or more states. In *Carlson*, the plaintiff could not bring her claim because Indiana's survivorship law did not provide her standing to sue for violations of her husband's rights. Because other states allowed survivor claims, there was no actual uniformity unless the Court created a federal cause of action. *Carlson*, 446 U.S. at 25. In *Bivens*, lack of uniformity—mentioned explicitly only in Justice

Harlan's concurrence—was relevant only because the plaintiff had showed that, since he had consented to the agents' entrance into his apartment, he had no cause of action under state law. *Bivens*, 403 U.S. at 394. *Davis* did not even address the lack of uniformity claim because the case dealt with the quintessential *Bivens* scenario: there was no existing cause of action, under either federal statutory or state law, for the alleged constitutional violation.

Qualms about "lack of uniformity" are irrelevant where, as here, the plaintiff has an adequate, and arguably superior, tort claim under state law. The plaintiff has not shown—because he cannot—that there is any state which does not provide recovery for that most fundamental tort claim, in which one person's negligent conduct causes physical and/or emotional harm to another. Perhaps the states, as "laboratories of democracy," *Landell v. Sorrell*, 406 F.3d 159, 178 (2d Cir. 2005) (Jacobs, J., dissenting from the denial of rehearing en banc), have adopted slightly different recovery caps or procedural rules, but the essence of the negligent tort claim existed as trespass on the case at common law when the forms of action were in full bloom, and exists today in all fifty states. As such, the panel's lack of uniformity preoccupation is as imagined as is any legal support for its assertion that state law remedies cannot, on their own, preclude recognition of a *Bivens* action.

II. The panel majority creates an irreconcilable circuit split with the Fourth and Eleventh Circuits, which correctly held that *Bivens* does not apply where adequate state remedies exist.

The panel majority's decision, by its own admission, creates a circuit split with the two courts

of appeals which held, on indistinguishable facts, that alternative state remedies are sufficient, on their own, to preclude recognition of a new *Bivens* claim. In *Alba v. Montford*, 517 F.3d 1249 (11th Cir. 2008), the Eleventh Circuit refused to recognize a *Bivens* action brought by a federal prisoner incarcerated in a privately-operated correctional facility against prison employees for deliberate indifference to his medical needs in violation of the Eighth Amendment. The court affirmed the district court's 12(b)(6) dismissal on the ground that alternative remedies (state law negligence and medical malpractice claims) existed by which the prisoner could recover from the employees. *Id.* at 1254.

In *Holly v. Scott*, 434 F.3d 287 (4th Cir. 2006), the Fourth Circuit refused to recognize a *Bivens* action for a federal prisoner suing individual employees of a privately-operated prison—the very company which is a defendant-appellant here—for alleged violation of his Eighth Amendment rights in failing to provide him with adequate medical care for his diabetes. The Fourth Circuit held that *Bivens* did not recognize an implied right of action for an inmate who had an adequate, and arguably superior, remedy under the state law of negligence.[8] *Id.* at 295.

The facts of *Alba* and *Holly* are so similar to this case that the panel majority does not even try to distinguish them. These cases dealt with federal prisoners held in privately-run prisons, who alleged violations of the Eighth Amendment because of

[8] The Fourth Circuit also grounded its dismissal of plaintiff 's *Bivens* action on the independent basis that the private employees of the prison were not federal actors for the purpose of *Bivens*. *Holly*, 434 F.3d at 292-93.

inadequate medical care, brought suit against the individual employees, and had alternative state tort claims (under negligence and medical malpractice) under which they could recover. Commendably, the panel majority simply admits that its holding with regard to alternative remedies "conflicts with both *Holly* and the Eleventh Circuit's holding in *Alba*." *Pollard v. The GEO Group, Inc.*, 607 F.3d 583, 588 (9th Cir. 2010).[9] The panel's explanation for this disagreement reduces to a policy judgment that plaintiffs in this situation should have another forum in which to pursue these claims even though an adequate state remedy exists. Whatever may be the merits of that policy judgment, it is for Congress, not for us, to make.

III. Conclusion

For the first time in this country's history, this court has created a "freestanding" federal cause of action against private company employees where adequate, and arguably superior, state remedies are available. As the panel majority contends, it is conceivable that there could be some constitutional violations for which there are no existing, alternative remedies under state tort law. If *Bivens* has any remaining vitality, those are the types of cases to which it was meant to apply. But this is

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[9] As mentioned in footnote 3, the panel majority's decision probably also creates a conflict with the Tenth Circuit's holding in *Peoples v. CCA Det. Ctrs.*, 449 F.3d 1097 (10th Cir. 2006) (en banc), in which an evenly divided en banc panel of the Tenth Circuit affirmed the district court's dismissal—which was based on the existence of alternative remedies under state negligence law—of a *Bivens* action brought by a federal prisoner against individual employees of a privately-operated pretrial detention center.

demonstrably not one of those cases. Pollard has adequate, alternative state remedies through which he can vindicate his constitutional rights. By recognizing an implied cause of action in this instance, the panel extends *Bivens* far beyond its carefully prescribed contours and places this circuit in direct conflict with each of the other circuits to address the issue. To my mind, such a remarkable opinion merited a second look en banc. I must dissent.

OPINION

PAEZ, Circuit Judge:

Plaintiff-Appellant Richard Lee Pollard, a federal inmate, appeals the district court's order dismissing his Eighth Amendment claims against employees of a private corporation operating a federal prison under contract with the Bureau of Prisons.[1] This appeal presents the question of whether the implied damages action first recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), allows a federal prisoner to recover for violations of his constitutional rights by employees of private corporations operating federal prisons. We conclude that it does.

I. BACKGROUND

The GEO Group, Inc. (GEO), under contract with the federal Bureau of Prisons (BOP), has operated the Taft Correctional Institution (TCI) since

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[1] We have jurisdiction pursuant to 28 U.S.C. § 1291.

December 1997.[2] Pollard is a federal inmate who, in 2001 and 2002, was incarcerated at TCI. During his imprisonment, Pollard slipped on a cart left in a doorway and had to be seen by the prison's medical staff.[3] He was x-rayed, diagnosed with possible fractures of both elbows, and placed in a bilateral sling. He was then referred to an orthopedic clinic outside the prison.

Before transporting Pollard to the clinic, a GEO employee directed him to don a jumpsuit. Pollard told the employee that putting his arms through the sleeves of the jumpsuit would cause him excruciating pain, but he was nonetheless required to put it on. Two employees also forced Pollard to wear a "black box" mechanical restraint device on his wrists despite Pollard's complaints about severe pain. An outside orthopedist diagnosed Pollard with serious injuries to his elbows and recommended that his left elbow be put into a posterior splint for approximately two weeks. Upon returning to TCI, Pollard was told that, due to limitations in staffing and facilities, his elbow would not be put into a posterior splint. Pollard claims that, in the following weeks, he was unable to feed or bathe himself and that the GEO employees failed to make alternative arrangements for him. He further alleges that he was required to

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[2] At the time Plaintiff-Appellant Pollard was incarcerated at TCI, the Geo Group, Inc., was known as Wackenhut Corrections Corporation.

[3] As the district court dismissed Pollard's suit pursuant to 28 U.S.C. § 1915A(b)(1) for failure to state a claim upon which relief may be granted, we must accept as true all allegations in Pollard's complaint and construe them in the light most favorable to him. *See Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000).

return to work before his injuries had healed and was again forced to wear the "black box" restraint when returning to the outside orthopedic clinic for a follow-up appointment.

Pollard subsequently filed a *pro se* complaint in the United States District Court for the Eastern District of California, alleging violations of his Eighth Amendment rights and seeking money damages under *Bivens*. His first amended complaint named GEO and eight individuals as defendants. Seven of these individuals were employees of GEO at the time of Pollard's injuries.[4] The eighth, Marshall Lewis, was a doctor employed by the Pacific Orthopedic Medical Group, which GEO had hired to treat Pollard. GEO was subsequently dismissed from the suit due to the Supreme Court's holding in *Correctional Services Corp. v. Malesko*, 534 U.S. 62 (2001), that private prison corporations are not subject to *Bivens* liability. *See* Order Dismissing Complaint With Leave to Amend at 2, *Pollard v. Wackenhut*, No. CV-F-01-6078 (E.D. Cal. Mar. 7, 2002).[5]

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[4] The seven GEO employee defendants were Raymond Andrews, Margaret Minneci, Jonathan Akanno, Robert Spack, Bob Steifer, Everett Uzzle and Becky Maness.

[5] We note that it is unclear whether Pollard appeals this dismissal. After GEO was dismissed from the litigation, Pollard nevertheless continued to name the organization as a defendant, although the later district court orders do not address GEO's liability. On appeal, Pollard has again named GEO, but his briefs are focused solely on the GEO employees' liability. Whether or not GEO is properly a party to this appeal, any liability is squarely foreclosed by *Malesko*, 534 U.S. at 63-64, 74 (holding that *Bivens* should not be extended to allow recovery against a private corporation operating a halfway house under contract with the BOP). Thus, we affirm

Pollard's suit against the remaining defendants was assigned to a magistrate judge for screening pursuant to 28 U.S.C. § 1915A(a). The Magistrate Judge issued proposed findings and a recommendation that Pollard's suit be dismissed under 28 U.S.C. § 1915A(b)(1) for failure to state a claim. Specifically, the Magistrate Judge concluded that a *Bivens* cause of action was not available to Pollard for two reasons: (1) state law provided him with alternative remedies for his injuries in the form of a tort action for negligence or medical malpractice; and (2) although under contract with the federal government, the GEO employees did not act under color of federal law. Pollard did not file objections to the Magistrate Judge's recommendation, and the district court adopted it in full and dismissed Pollard's complaint.

Shortly thereafter, Pollard, now represented by counsel, filed a motion to vacate the judgment. That motion requested that the dismissal be vacated for the limited purpose of allowing Pollard to assert objections to the Magistrate Judge's findings and recommendation, thereby preserving his right to appeal. The district court did not rule on the motion. Pollard ultimately filed a timely notice of appeal, which was served on the Acting Executive Assistant at TCI, but not on any of the individually named defendants personally. Before this court, only five of the original eight individual defendants filed an opposition brief.[6]

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the district court's dismissal of Pollard's claims against The GEO Group, Inc.

[6] Raymond Andrews was not included in Pollard's appeal from the district court's judgment, Everett Uzzle passed away in March 2008, and there is no evidence that physician

We review de novo a district court's grant of a motion to dismiss under 28 U.S.C. § 1915A. *Resnick*, 213 F.3d at 447.

II. PROCEDURAL CHALLENGES

The GEO employees initially argue that we should dismiss this appeal because: (1) they were never served with Pollard's opening brief and (2) Pollard failed to enter objections to the Magistrate Judge's findings and recommendation and thereby forfeited his right to appeal. We are not convinced by either of these arguments, which we address in turn.

First, the GEO employees argue that because they were not served with a copy of Pollard's opening brief, this court lacks jurisdiction over this appeal.[7] Fed. R. App. Proc. 25(b) provides: "Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel." It is undisputed that Pollard only served his opening brief on Dale Patrick, identified as the Acting Executive Assistant for TCI.

Fed. R. App. P. 3(a)(2) provides that "[a]n appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the

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Marshall Lewis was ever served in the original lawsuit or this appeal.

[7] The GEO employees also point out that they were never served with the notice of appeal, but concede that under Fed. R. App. P. 3, such a failure does not affect the validity of the appeal. We agree, especially in light of the liberal construction Fed. R. App. P. 3 is due. *Smith v. Barry*, 502 U.S. 244, 248 (1992) ("Courts will liberally construe the requirements of Rule 3.").

validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal." *See Azizian v. Federated Dep't Stores*, 499 F.3d 950, 961 (9th Cir. 2007) (noting, in the context of a violation of Fed. R. App. P. 7, that Fed. R. App. P. 3(a)(2) grants to this court's "sound discretion" whether to dismiss an appeal). In deciding whether such a deficiency warrants dismissal, we are entitled to consider whether Pollard's failure resulted in prejudice to the GEO employees or to this court. *See Everest & Jennings, Inc. v. E & J Mfg. Co.*, 263 F.2d 254, 262 (9th Cir. 1959) (holding that, because the opposing party could demonstrate no prejudice, a failure to file briefs in accordance with court rules did not warrant dismissal); *Recinos De Leon v. Gonzales*, 400 F.3d 821, 822 (9th Cir. 2005) (published order) (considering prejudice to the opposing party and to the court in deciding whether to dismiss an appeal based on the late filing of a brief).

[1] The GEO employees have not alleged—nor can we surmise—any prejudice resulting from Pollard's failure to comply strictly with the requirements of Rule 25(b). Pollard's counsel has provided the court with an affidavit (and accompanying telephone records) declaring that he contacted GEO and was specifically instructed by a representative of GEO's General Counsel to send legal correspondence to TCI. We have no reason to doubt that Pollard's counsel was so instructed, as the same law firm represents GEO and the individually named defendants on appeal. Indeed, the appellees' answering brief was filed on behalf of all those parties (other than the

physician not employed by GEO, Marshall Lewis).[8] Thus, we exercise our discretion under Fed. R. App. P. 3(a)(2) and decline to dismiss this appeal for this alleged deficiency.

[2] Second, the GEO employees argue that dismissal is warranted because Pollard failed to file timely objections to the Magistrate Judge's findings and recommendation. The GEO employees contend that the failure to file objections constitutes a waiver of Pollard's right to appeal. But this court has held that such a failure does not, "standing alone, ordinarily constitute a waiver of the [appeal]." *Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991) (citing *Britt v. Simi Valley Unified Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983)). Rather, Martinez counsels that failure to object to a magistrate judge's findings and recommendations "is a factor to be weighed in considering the propriety of finding waiver of an issue on appeal." *Id.* Because Pollard was proceeding *pro se* at the time of the alleged waiver, and because the GEO employees have demonstrated no prejudice resulting from Pollard's failure to file objections, we decline to exercise our discretionary authority to dismiss this appeal.

III. DISCUSSION

We turn to the merits of this appeal. The district court dismissed Pollard's suit pursuant to 28 U.S.C.

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[8] We further note that GEO and its employees were twenty-one months late in filing their answering brief. In a motion before this court—filed over a year after their answering brief was due—appellees argued that the district court lacked personal jurisdiction and that this court therefore lacked jurisdiction to consider the appeal. That motion was denied—and GEO was ordered to file an answering brief—in April 2009.

§ 1915A(b)(1) for failure to state a claim. [9] Specifically, the Magistrate Judge's findings and recommendation concluded that a *Bivens* action was not available to Pollard because: (1) the GEO employees do not act under color of federal law; and (2) Pollard could pursue a claim for damages against the GEO employees under state tort law. We address these issues in turn and conclude that (1) the GEO employees act under color of federal law for purposes of *Bivens* liability and (2) the availability of a state tort remedy does not foreclose Pollard's ability to seek redress under *Bivens*. We recognize that the former holding directly conflicts with the Fourth Circuit's holding in *Holly v. Scott*, 434 F.3d 287, 294 (4th Cir. 2006), and the latter conflicts with both *Holly* and the Eleventh Circuit's holding in *Alba v. Montford*, 517 F.3d 1249, 1254 (11th Cir. 2008).[10]

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[9] Neither the Magistrate Judge nor the district judge reached the question of whether Pollard's allegations, if true, would amount to a cognizable claim under the Eighth Amendment. We leave it to the district court, if necessary, to make that determination upon remand.

[10] The dissent suggests that this latter holding is also in conflict with Tenth Circuit law. *See* Dissenting Op. at 19717 (stating that "[u]ntil now, the federal circuits that have addressed the issue have held correctly that a prisoner may not maintain such an action" and citing *Peoples v. CCA Det. Ctrs.*, 422 F.3d 1090 (10th Cir. 2005), *vacated in relevant part and aff'd by equally divided en banc panel*, 449 F.3d 1097 (10th Cir. 2006) (per curiam), *cert. denied*, 549 U.S. 1056 (2006) and 549 U.S. 1063 (2006). In fact, the portion of the Tenth Circuit's opinion addressing this issue was vacated by an equally divided en banc panel under Tenth Circuit rules and lacks any precedential value. *Peoples*, 449 F.3d at 1099 ("We are evenly divided, however, for substantially the same reasons as are set forth in the panel's majority and dissenting opinions, on the question whether a *Bivens* action is available against employees of a privately operated prison. Because there is no majority on

We discuss our disagreement with our sister circuits *infra*.

1. Federal Action

[3] In *Bivens*, the Supreme Court recognized an implied cause of action under the Fourth Amendment for injury caused "by a federal agent acting under color of his authority * * *" 403 U.S. at 389. It is widely accepted that *Bivens* provides a cause of action only against an official "acting under color of federal law." *See, e.g., Morgan v. United States*, 323 F.3d 776, 780 (9th Cir. 2003) ("Morgan's Complaint sufficiently sets forth the elements of a *Bivens* claim by alleging a violation of his constitutional rights by agents acting under the color of federal law."). Thus, the threshold question presented here is whether the GEO employees can be considered federal agents acting under color of federal law in their professional capacities. We conclude that they can.

We note at the outset that the one federal court of appeal to have directly addressed the question—the Fourth Circuit—has held that employees of private corporations operating federal prisons are not federal actors for purposes of *Bivens*. *Holly*, 434 F.3d at 294. *See also Alba*, 517 F.3d at 1254 (assuming, without deciding, that a privately operated prison is a government actor for purposes of *Bivens* liability). In *Holly*, as in this case, the defendants were employees of GEO, which the Fourth Circuit described as "a wholly private corporation in which the federal government has no stake other than a contractual relationship." 434 F.3d at 291. Reasoning that

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the en banc panel, the district court's ruling in *Peoples II* on this issue is affirmed by an equally divided court.").

"[a]pplication of *Bivens* to private individuals simply does not find legislative sanction," the *Holly* majority held that the GEO employees were not federal actors for purposes of *Bivens*. *Id.* at 292-94.

[4] Neither the Supreme Court nor our court has squarely addressed whether employees of a private corporation operating a prison under contract with the federal government act under color of federal law. That said, we have held that private defendants can be sued under *Bivens* if they engage in federal action. *Schowengerdt v. Gen. Dynamics Corp.*, 823 F.2d 1328, 1337-38 (9th Cir. 1987) (citing *Ginn v. Mathews*, 533 F.2d 477 (9th Cir. 1976), *abrogated on other grounds by Rendell-Baker v. Kohn*, 457 U.S. 830, 838-43 (1982)); *see also Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101, 1104 (9th Cir. 2004) ("[T]o the extent that [Plaintiff] sought recovery from individual employees of the [private corporation managing the federal prison], the case had to [be] brought as a *Bivens* action."). In determining whether a private individual has engaged in federal action, we have looked to "state action" principles developed by the Supreme Court in suits brought under 42 U.S.C. § 1983. *See Morse v. N. Coast Opportunities, Inc.*, 118 F.3d 1338, 1343 (9th Cir. 1997) ("[W]e apply similar tests to determine whether federal action exists to support a *Bivens* claim or to determine whether State action will permit a § 1983 cause of action."); *Mathis v. Pac. Gas & Elec. Co.*, 891 F.2d 1429, 1432 n.3 (9th Cir. 1989) ("The standards for determining whether an action is governmental are the same whether the purported nexus is to the state or to the federal government."); *see also Schowengerdt*, 823 F.2d at 1339 n.17

(suggesting the use of § 1983 state action tests to identify federal action in the *Bivens* context).

Other circuits have also recognized the similarity of the § 1983 and *Bivens* doctrines. *See Williams v. Hill*, 74 F.3d 1339, 1340 (D.C. Cir. 1996) (per curiam) (noting that bodies of law relating to § 1983 and *Bivens* actions have been assimilated in most respects); *Chin v. Bowen*, 833 F.2d 21, 24 (2d Cir. 1987) ("Though the two actions are not precisely parallel, there is a general trend in the appellate courts to incorporate § 1983 law into *Bivens* suits." (footnote and internal quotations omitted)); *Morast v. Lance*, 807 F.2d 926, 931 (11th Cir. 1987) ("[T]he concept of action under color of federal law for purposes of a *Bivens* action is almost identical to the doctrine of action under color of state law for purposes of a § 1983 action . . . ."). Indeed, even the Supreme Court has recognized a connection between the two doctrines, although at a high level of abstraction. *See Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006) ("Though more limited in some respects not relevant here, a *Bivens* action is the federal analog to suits brought against state officials under [§ 1983].").

[5] In the § 1983 context, we have recognized a number of tests for identifying state action. *See Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983) (describing the government nexus test, the joint action test, the public function test and the state compulsion test). For our purposes, the most applicable is the "public function" test: a private entity may engage in state action where it exercises "powers traditionally exclusively reserved to the State." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974). In *West v. Atkins*, the Supreme Court

applied a variation of that test in concluding that private correctional employees under contract with North Carolina were amenable to suit under § 1983 for failing to render constitutionally adequate medical care. *See* 487 U.S. 42, 49-51 (1988). The Court found state action present in the § 1983 action because the defendant exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Id.* at 49 (internal quotation marks and citation omitted). Ten years before *West*, the Court had recognized an obligation on the part of state correctional employees "to provide medical care for those whom it is punishing by incarceration." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *see also Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (extending *Bivens* liability to federal correctional employees). In finding such an obligation under the Constitution, the *Estelle* Court reasoned that "[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." *Estelle*, 429 U.S. at 103.

Similarly, in evaluating whether a prison physician employed as an independent contractor was amenable to suit under § 1983, the *West* Court stated:

> If [the physician] misused his power by demonstrating deliberate indifference to [the prisoner's] serious medical needs, the resultant deprivation was caused, in the sense relevant for state-action inquiry, by the State's exercise of its right to punish [the prisoner] by incarceration and to deny him a venue independent of the State to obtain needed medical care.

West, 487 U.S. at 55. In reaching this conclusion, the Court noted that "[i]t is only those physicians authorized by the State to whom the inmate may turn" and that "[u]nder state law, the only medical care [the prisoner] could receive for his injury was that provided by the State." *Id.* The Court rejected the notion that, because the physician was an independent contractor rather than a direct employee of the prison, the state action analysis would change. Instead, the Court held that, "[w]hether a physician is on the state payroll or is paid by contract, the dispositive issue concerns the relationship among the State, the physician, and the prisoner." *Id.* at 56. Thus, the Court concluded, because the private employee was "fully vested with state authority to fulfill essential aspects" of the state's duty to provide medical care to state prisoners, he was fulfilling a public function and was therefore amenable to § 1983 liability. *Id.* at 57.

[6] In our view, there is no principled basis to distinguish the activities of the GEO employees in this case from the governmental action identified in *West*. Pollard could seek medical care only from the GEO employees and any other private physicians GEO employed. If those employees demonstrated deliberate indifference to Pollard's serious medical needs, the resulting deprivation was caused, in the sense relevant for the federal-action inquiry, by the federal government's exercise of its power to punish Pollard by incarceration and to deny him a venue independent of the federal government to obtain needed medical care. On this point, *West* is clear.

[7] The Fourth Circuit does not share our understanding of *West*. The *Holly* majority concluded that *West*'s reasoning does not apply to

privately operated federal prisons because the relationship among the state, the physician and the prisoner is "very different in this case, where the correctional facility is privately run, than in *West* * * *, where the state itself was directly responsible for managing the prison." *Holly*, 434 F.3d at 294. Curiously, the Fourth Circuit's reading of *West* suggests that independent contractors are state actors when directly hired by the state, but that employees of an independent contractor are not state actors because they are not hired by the state. We cannot subscribe to such an illogical reading of *West*. As Judge Motz noted in her concurrence in *Holly*, *West* itself rejected the notion that "by adding an additional layer, the government can contract away its constitutional duties." *Id.* at 299 n.1 (Motz, J., concurring in the judgment). Instead, *West* makes clear that " '[c]ontracting out' care '*does not* relieve' the government of its 'constitutional duty' to provide adequate care or 'deprive inmates of the means to vindicate their Eighth Amendment rights.'" *Id.* (quoting *West*, 487 U.S. at 55-56).

Nor do we find convincing the Fourth Circuit's reliance on *Richardson v. McKnight*, 521 U.S. 399 (1997). *See Holly*, 434 F.3d at 293. Contrary to the Fourth Circuit's holding, that case does not stand for the proposition that private prison employees never act under color of federal or state law. *See id.* Indeed, the Court in *Richardson* expressly noted that it did "not address[ ] whether the defendants are liable under § 1983 even though they are employed by a private firm." 521 U.S. at 413. Rather, the Court there addressed only the question of whether private prison guards at state prisons are entitled to qualified immunity when sued for constitutional

violations, not whether those guards acted under color of federal or state law. See *id.* As other cases confirm, the immunity question is fundamentally distinct from the governmental action question we encounter here. *See Wyatt v. Cole*, 504 U.S. 158, 168-69 (1992) (holding that "private defendants" were not entitled to qualified immunity, but remanding for a determination of whether they were liable as government actors); *Jensen v. Lane County*, 222 F.3d 570, 580 (9th Cir. 2000) (holding that a private physician, contracting with a county psychiatric hospital, was liable as a state actor but was not entitled to qualified immunity).

In *Richardson*, the Court explained that qualified immunity applies only where "a tradition of immunity was so firmly rooted in the common law * * * that Congress would have specifically so provided had it wished to abolish the doctrine." 521 U.S. at 403 (internal quotation marks and citation omitted). The Court noted that, although private individuals had operated correctional facilities in the 18th and 19th centuries, those individuals did not historically enjoy qualified immunity. *Id.* at 404-07. Because there was therefore no " 'firmly rooted' tradition of immunity applicable to privately employed prison guards," those private guards were not entitled to qualified immunity. *Id.* at 404, 412.

Contrary to the Fourth Circuit's understanding, the *Richardson* Court's observation that private individuals "were heavily involved in prison management during the 19th century," 521 U.S. at 405, does not mean that private prison guards exercise a power that is not "traditionally exclusively reserved to the State" under the public function test for identifying state action. *Holly*, 434 F.3d at 293.

The *Holly* majority looked to the "operation of the prison, not the fact of [the prisoner's] incarceration," to conclude that private prison guards did not perform a traditionally public function. *Id.* The *Holly* majority, however, does not provide, nor can we identify, any support for such a distinction. The relevant function here is not prison management, but rather incarceration of prisoners, which of course has traditionally been the State's "*exclusive* prerogative." *Rendell-Baker*, 457 U.S. at 842 (internal quotation marks and citation omitted). *West* reflects this understanding that the relevant function is incarceration, explaining that a prisoner's injury from inadequate medical care would be "caused, in the sense relevant for state-action inquiry, by the State's exercise of its right to punish [the prisoner] by incarceration." 487 U.S. at 55.

[8] Likewise, in the § 1983 context, our sister circuits have routinely recognized that imprisonment is a fundamentally public function, regardless of the entity managing the prison. The Fifth Circuit, for example, has held that "confinement of wrongdoers—though sometimes delegated to private entities —is a fundamentally governmental function. These [private] corporations and their employees are therefore subject to limitations imposed by the Eighth Amendment." *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003) (per curiam). Likewise, the Sixth Circuit has held that private prison employees "perform[ ] the 'traditional state function' of operating a prison." *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996); *see also Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 102 (6th Cir. 1991) (per curiam); *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 703 (11th

Cir. 1985). And, in his dissent in *Richardson*, Justice Scalia, joined by three other Justices, noted that "private prison management firms, who perform the same duties as state employed correctional officials, * * * exercise the most palpable form of state police power." *Richardson*, 521 U.S. at 414 (Scalia, J., dissenting).

[9] In accord with *West* and other federal courts of appeal, we hold that there is but one function at issue here: the government's power to incarcerate those who have been convicted of criminal offenses. We decline to artificially parse that power into its constituent parts—confinement, provision of food and medical care, protection of inmate safety, etc.—as that would ignore that those functions all derive from a single public function that is the sole province of the government: "enforcement of state-imposed deprivation of liberty." *Richardson*, 521 U.S. at 416 (Scalia, J., dissenting) (noting that this function is "a prototypically governmental function"). Because that function is "traditionally the *exclusive* prerogative of the [government]," it satisfies the "public function" test under *Rendell-Baker*. 457 U.S. at 842 (internal quotation marks and citation omitted).

Finally, we note that in *Malesko*, the Supreme Court explicitly left open the possibility that private prison employees could act under color of federal law and therefore face *Bivens* liability. The Court, in holding that a corporate entity operating a federal prison could not be subject to *Bivens* liability, noted that "the question whether a *Bivens* action might lie against a private individual is not presented here." *Malesko*, 534 U.S. at 65. The dissent, authored by

Justice Stevens, confirmed that this question remained open:

> The Court recognizes that the question whether a *Bivens* action would lie against the individual employees of a private corporation like Correctional Services Corporation (CSC) is not raised in the present case. Both CSC and [Malesko] have assumed *Bivens* would apply to [private prison employees], and the United States as *amicus* maintains that such liability would be appropriate under *Bivens* * * *. [T]he reasoning of the Court's opinion relies, at least in part, on the availability of a remedy against employees of private prisons.

Id. at 79 n.6 (Stevens, J., dissenting) (internal citation omitted). Thus, despite the contrary holding in the Fourth Circuit, we conclude that the GEO employees act under color of federal law for purposes of *Bivens* liability.[11]

2. Availability of a *Bivens* Remedy

Even where defendants have engaged in federal action, we do not always allow *Bivens* suits to go forward. We begin with a review of the Supreme Court's evolving *Bivens* jurisprudence to help illuminate when we will recognize an implied right of action against individuals engaged in federal action.

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[11] We note that the GEO employees may also qualify as federal actors under the "nexus" test as articulated by *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001). That test asks whether "there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Brentwood*, 531 U.S. at 295 (internal quotations omitted). Given the clear applicability of the "public function" test, we need not undertake this analysis.

In *Bivens*, the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Malesko*, 534 U.S. at 66. In the years following *Bivens*, the Court recognized a *Bivens* cause of action on only two occasions. In *Davis v. Passman*, 442 U.S. 228, 248-49 (1979), the Court held that the plaintiff stated a cause of action for money damages against her former employer, a member of the United States Congress, for employment discrimination in violation of the Due Process Clause of the Fifth Amendment. The following year, in *Carlson v. Green*, 446 U.S. 14, 24 (1980), the Court held that a federal inmate could bring suit for money damages against federal prison officials under the Eighth Amendment.

Since *Carlson* and *Davis*, the Supreme Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68. Indeed, the Court has "rejected invitations to extend *Bivens*" in every new factual and legal context presented after *Carlson*. *Id.* at 70; *see, e.g.*, *id.* at 63 (declining to allow an implied right of action for an inmate alleging Eighth Amendment violations against a private corporation operating a federal prison); *FDIC v. Meyer*, 510 U.S. 471, 473 (1994) (declining to allow an implied right of action against a federal agency); *Schweiker v. Chilicky*, 487 U.S. 412, 414 (1988) (declining to allow an implied right of action for disabled persons who were allegedly denied Social Security benefits in violation of the Fifth Amendment); *Bush v. Lucas*, 462 U.S. 367, 368 (1983) (declining to allow an implied right of action for a federal employee allegedly disciplined in violation of the First

Amendment); *Chappell v. Wallace*, 462 U.S. 296, 297 (1983) (declining to allow an implied right of action for military personnel alleging racial discrimination by superior officers). Although *Bivens* remains intact, it is apparent that the era Justice Scalia referred to as the "heady days in which [the Supreme] Court assumed common-law powers to create causes of action" is no more. *Malesko*, 534 U.S. at 75 (Scalia, J., concurring).

The Court's most recent consideration of whether to extend *Bivens* distills its prior three decades of jurisprudence into a two part test:

> [O]ur consideration of a *Bivens* request follows a familiar sequence, and on the assumption that a constitutionally recognized interest is adversely affected by the actions of federal employees, the decision whether to recognize a *Bivens* remedy may require two steps. In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.

Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (internal quotations and citations omitted). Applying *Wilkie*'s two-part test, we hold that a *Bivens* cause of action is available here.

a. Application of the Wilkie Two-Part Test

[10] Under *Wilkie*, we first must identify whether "any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* Second, even in the absence of an alternative, we must look to any "special factors counselling hesitation before authorizing a new kind of federal litigation." *Id.* (internal quotation marks and citation omitted). We address each issue in turn and conclude that Pollard should be entitled to pursue his Eighth Amendment claim against the GEO employees.

(i) Wilkie *Part One: Alternative Existing Processes*

The GEO employees argue that because Pollard can pursue a state law negligence action for damages, he has an "alternative, existing process" for protecting his interests and thus should not be afforded a *Bivens* remedy.[12] The Magistrate Judge

[12] In *Malesko*, the Court noted that one of the plaintiff's alternative existing processes for seeking a remedy was his "full access to remedial mechanisms established by the BOP." 534 U.S. at 74. Although GEO employees' counsel could not identify at oral argument whether there were any BOP administrative remedies available to Pollard, it would appear that none exist. The BOP's Administrative Remedy Program applies to those incarcerated in BOP facilities and half-way houses operated under contract with the BOP. 28 C.F.R. § 542.10(b) (2002). It does not apply to individuals confined in "other non-federal facilities." *Id.* Thus, according to a report released by the Department of Justice in 2008:

> [t]he Administrative Remedy Program is administered differently for inmates in private facilities. Should an inmate at a private facility wish to appeal a local decision, the inmate may file with the local institution. Inmates who wish to grieve a specific BOP matter (which is limited to classification, designation, sentence computation, reduction

agreed, stating in his recommendation and findings that "[i]n light of the existing alternative remedies available to [Pollard], the court finds that extending *Bivens* would not provide [Pollard] with an otherwise nonexistent cause of action." Neither the Ninth Circuit nor the Supreme Court has ever addressed whether the existence of a state remedy, alone, is sufficient to displace the *Bivens* remedy. We conclude that the mere availability of a state law remedy does not counsel against allowing a *Bivens* cause of action.

In evaluating whether alternative, potential remedies preclude a *Bivens* action, the Court has consistently stressed that only remedies crafted *by Congress* can have such a preclusive effect. For example, in *Carlson*, the Court held that where "defendants show that Congress has provided an alternative remedy which it explicitly declare[s] to be a ***substitute*** for recovery directly under the Constitution and view[s] as equally effective," no *Bivens* remedy is available. *Carlson*, 446 U.S. at 18-19. Likewise, in *Bush v. Lucas*, the Court held that

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of sentence, removal or disallowance of Good Conduct Time, or issues directly involving BOP staff) may utilize the progressive BOP administrative remedy process available to all federal inmates.

U.S. Dep't of Justice, Legal Resource Guide to the Federal Bureau of Prisons 35 (2010), *available at* http://www.bop.gov/news/PDFs/legal_guide.pdf. As Pollard's claim does not fall within any of the "specific BOP matter[s]," he does not have a BOP administrative remedy under 28 C.F.R. § 542.10. Nor did GEO employees' counsel identify any administrative remedies provided by the corporation itself. In sum, whatever effect the BOP remedies may have had on the *Malesko* Court's determination of the propriety of extending *Bivens*, it is irrelevant here.

the *Bivens* remedy for an alleged First Amendment violation was precluded by an "elaborate remedial system that has been constructed step by step" by Congress. 462 U.S. at 388; *see Schweiker*, 487 U.S. at 425 (holding that a remedial scheme created by Congress, even if incapable of addressing all of plaintiff's injuries, precluded a *Bivens* action).

In *Malesko*, however, the Court implicitly suggested that non-congressionally created remedies might displace *Bivens*. *See* 534 U.S. at 70. There, the Court noted that it had consistently declined to extend *Bivens* except where the extension would "provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally, or [would] provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct." *Id.* (emphasis in original). The GEO employees, like the Fourth and Eleventh Circuits, place great weight on this "any alternative remedy" language. They argue that it shows that state tort law can preclude a *Bivens* remedy. *See Alba*, 517 F.3d at 1253-55; *Holly*, 434 F.3d at 295-97.[13] *Wilkie*, however, demonstrates that this reads too much into the Court's words in *Malesko*.

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[13] The dissent also misreads *Malesko* to hold that "[t]he availability of an adequate alternative remedy should end the analysis [of whether to extend *Bivens*]." Dissenting Op. at 19726. *Malesko*, however, did not set forth any such blanket rule. Rather, *Malesko* reasoned that because the plaintiff had alternative remedies against individual officers—and because he was not seeking recovery against an individual officer—allowing plaintiff to proceed with an implied cause of action would not serve the core deterrence goals of *Bivens*. *See* 534 U.S. at 73-74. Here, however, Pollard *is* seeking a remedy

[11] In *Wilkie*, the Court made clear that the mere existence of an alternative state remedy, alone, did not preclude a *Bivens* action. There, the Court noted that the plaintiff had "alternative, existing" remedies for the alleged violation of his Fifth Amendment rights, including state tort remedies, administrative claims against the Bureau of Land Management, and tort claims under the Federal Tort Claims Act. 551 U.S. at 553-54. Even though the plaintiff undoubtedly had a "tort remedy" available to him, the Court concluded that because "the forums of defense and redress open to [the plaintiff] are a patchwork, an assemblage of state and federal, administrative and judicial benches applying regulations, statutes and common law rules," "[i]t would be hard to infer that Congress expected the Judiciary to stay its *Bivens* hand, but equally hard to extract any clear lesson that *Bivens* ought to spawn a new claim." *Id.* at 551, 554. Thus, the mere existence of a potential state law claim did not suffice to preclude a *Bivens* action.

Instead, the *Wilkie* opinion requires that we not simply inquire into the existence of alternative remedies generally, but rather that we ask whether "any alternative, existing process for protecting the interest amounts to a convincing reasons for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* at 550. For two reasons, state court remedies, alone, do not amount to such a "convincing reason."

[12] First, as *Wilkie* implies and the Court has repeatedly recognized, we consider alternative

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against an individual officer, and thus *Malesko* is not controlling.

remedies because the judicially created *Bivens* remedy should yield to congressional prerogatives under basic separation of powers principles. *Id.* at 554 (looking to alternative remedies for evidence that "Congress expected the Judiciary to stay its *Bivens* hand"); *see also Malesko*, 534 U.S. at 69 ("So long as the plaintiff ha[s] an avenue for some redress, bedrock principles of separation of powers foreclose[ ] judicial imposition of a new substantive liability."); *Schweiker*, 487 U.S. at 423 ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations * * * we have not created additional *Bivens* remedies."); *Bush*, 462 U.S. at 378 ("When Congress provides an alternative remedy, it may * * * indicate its intent * * * that the Court's power should not be exercised."); *Carlson*, 446 U.S. at 23 ("The question whether [an] action for violations by federal officials of federal constitutional rights should be left to the vagaries of the laws of the several States admits of only a negative answer in the absence of a contrary congressional resolution."). So too has this circuit recognized the importance of deferring to Congress in this arena. *See W. Radio Servs. Co. v. United States Forest Serv.*, 578 F.3d 1116, 1123 (9th Cir. 2009) (finding remedies available under the Administrative Procedure Act indicative of congressional intent to displace *Bivens*); *Libas Ltd. v. Carillo*, 329 F.3d 1128, 1130 (9th Cir. 2003) (noting that a *Bivens* claim can be precluded when Congress either provides an alternative remedy or provides a mechanism for relief it considers adequate to remedy constitutional violations); *Berry v. Hollander*, 925 F.2d 311, 314 (9th Cir. 1991) ("So long as Congress'

failure to provide money damages, or other significant relief, has not been inadvertent, courts should defer to its judgment." (internal quotation marks omitted)).

[13] Second, the Court has recognized that the policy "obvious[ly]" motivating *Bivens* was "that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules." *Carlson*, 446 U.S. at 23. In *Carlson*, the Court made a point of noting that the plaintiff's action would have failed under the survivorship law of the forum state. *Id.* at 17 n.4. The Court emphasized that "only a uniform federal rule of survivorship will suffice to redress the constitutional deprivation here alleged and to protect against repetition of such conduct." *Id.* at 23. As we recently noted in *Castaneda v. United States*, 546 F.3d 682, 701 (9th Cir. 2008), *overruled on other grounds by Hui v. Castaneda*, No. 08-1529 (May 3, 2010),[14] "the remedies we and the Supreme Court have held to preclude *Bivens* * * * applied uniformly throughout the republic." Although *Castaneda* is no longer good law, this observation was not addressed by the Supreme Court and comports with our analysis of the Court's *Bivens* jurisprudence.[15] *See Schweiker*,

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[14] Although involving *Bivens* claims against federal officers, *Hui v. Castaneda* was ultimately decided solely on the issue of absolute immunity under 42 U.S.C. 233(a). It therefore has no direct bearing on this case.

[15] The dissent contends that *Malesko* disproves this rule, arguing that "the Court declined to recognize a *Bivens* action *because of state remedies*." Dissenting Op. at 19722 (emphasis added). That is not *Malesko*'s holding. *Malesko* also relied on administrative remedies fashioned by the BOP—which apply uniformly across federal prisons—in reaching its holding. *See* 534 U.S. at 74. Furthermore, as discussed above, *Malesko* also

487 U.S. at 414 (holding that Social Security regulations and procedures precluded a *Bivens* action); *Bush*, 462 U.S. at 368 (holding that federal civil service regulations precluded a *Bivens* remedy).

[14] If we were to allow state tort law to preclude a *Bivens* action for Pollard and similarly situated prisoners, the liability of federal officials for constitutional violations would no longer be governed by uniform rules. The substance, procedural requirements, and remedies of state tort law—especially with regard to causes of action for negligence and medical malpractice—vary widely from state to state. For example, assuming Pollard were to bring a claim for medical malpractice under California law, the cap on his non-economic damages would be $250,000. *See* Cal. Civ. Code § 3333.2. But, under Oregon law (where Pollard was transferred in the midst of this litigation), Pollard's medical malpractice claim would not be subject to the state's non-economic damages cap. *See Lakin v. Senco Prods.*, 987 P.2d 463 (Or. 1999) (holding that non-economic damages cap mandated by Or. Rev. Stat. § 31.710(1) is unconstitutional as applied to common-law negligence claims). Likewise, the statute of limitations for bringing his suit under California law would be three years after the date of his injury or one year after he discovered the injury, whichever came first. *See* Cal. Civ. Proc. Code § 340.5. But Oregon law would require Pollard to bring his suit within two years of discovering the injury. *See* Or. Rev. Stat. § 12.110(4). We need not belabor the obvious point that state tort remedies are anything but "uniform."

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relied on the fact that the plaintiff was not seeking recovery against an individual officer. *See id.* at 73-74, 122 S.Ct. 515.

[15] The *Bivens* inquiry turns in part on "bedrock principles of separation of powers," *Malesko*, 534 U.S. at 69, but concluding that a *Bivens* cause of action must yield to state tort law does little to demonstrate deference to congressional prerogatives. Thus, we conclude that state remedies alone are insufficient to displace a *Bivens* remedy under the first prong of the *Wilkie* test.

(ii) Wilkie *Part Two: "Special Factors Counselling Hesitation"*

Wilkie's second step requires us to "weigh[ ] reasons for and against the creation of a new cause of action, the way common law judges have always done." 551 U.S. at 554. In other words, we must look to any "special factors counseling hesitation before authorizing a new kind of federal litigation." *Id.* at 550 (internal quotation marks and citation omitted). The Court has emphasized that we must differentiate "*special*" factors from "*any*" factors. *McCarthy v. Madigan*, 503 U.S. 140, 151 (1992), *superseded by statute*, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321, *as recognized in Booth v. Churner*, 532 U.S. 731, 740-41 (2001). Although the Court has never compiled an exhaustive list of these "special" factors, some that the Court has previously considered include: (1) whether it is feasible to create a workable cause of action, *Wilkie*, 551 U.S. at 555; (2) whether extending the cause of action would undermine *Bivens*'s deterrence goals, *Malesko*, 534 U.S. at 70-71; (3) whether an extension of *Bivens* would impose asymmetric liability costs on privately operated facilities as compared to government-operated facilities, *id.* at 72; and (4) whether unique attributes of an area, like the military, give reason to infer that

congressional inaction is deliberate, *see Chappell*, 462 U.S. at 304. As the Court has already recognized a *Bivens* cause of action for inmates in government-run federal prisons, it appears that prisons do not have the types of unique attributes that counseled against recognizing a *Bivens* action for claims against the military in *Cha[p]pell*. Nor did the Court allude to any such unique attributes in *Malesko*. Thus, we address only the first three of these considerations.

(a) Feasibility

[16] Pollard alleges a basic Eighth Amendment cause of action under *Bivens*. Since *Carlson*, courts have regularly recognized this type of action against federal prison officials, and the applicable standards are clear. *See, e.g., Powell v. Lennon*, 914 F.2d 1459 (11th Cir. 1990); *Berg v. Kincheloe*, 794 F.2d 457 (9th Cir. 1986); *Gardner v. Wilson*, 959 F. Supp. 1224, 1228 (C.D. Cal. 1997); *Lowrance v. Coughlin*, 862 F. Supp. 1090 (S.D.N.Y. 1994). There is no need for the district court to craft new standards or remedies to address Pollard's claims. Accordingly, there are no feasibility concerns that would counsel hesitation under *Wilkie*.

By contrast, the regime the GEO employees propose—allowing a *Bivens* cause of action to go forward only where a plaintiff would otherwise have no alternative remedy—would likely be difficult to administer. The Eighth Amendment protects against conditions of confinement that "involve the wanton and unnecessary infliction of pain * * * [or are] grossly disproportionate to the severity of the crime warranting imprisonment." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). But many acts meeting that standard may not be covered by state

tort law. For example, a prison inmate deprived of access to a toilet for several days would have a strong case against prison officers under *Bivens*. *See DeSpain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001) (concluding that exposure to human waste, even for 36 hours, would constitute a sufficiently serious deprivation to violate Eighth Amendment); *see also Vinning-El v. Long*, 482 F.3d 923, 924 (7th Cir. 2007) (per curiam) (citing numerous cases on minimum level of hygiene required by the Eighth Amendment). But, although tort law imposes a duty on those with custody of another to protect that person "against unreasonable risk of physical harm," Restatement (Second) of Torts § 314A(1)(a), (4) (1965), it is unclear whether deprivation of a toilet would amount to "physical harm." Likewise, it is unclear whether a deprivation of outdoor exercise would amount to a tort violation, despite our conclusion that such deprivation constitutes an Eighth Amendment violation in certain circumstances. *See Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979).

Nor is it apparent whether a prisoner could recover under state law for the denial of "basic necessities such as socks, toilet paper, and soap." *See Irabor v. Perry County Corr. Ctr.*, No. 06-0483-BH-C, 2008 WL 1929965, at *2 (S.D. Ala. Apr. 30, 2008). Although a district court considering a constitutional claim based on such injuries stated that the plaintiff had "adequate state tort remedies available * * * including, but not limited to, negligence and wantonness," *id.* at *4, we find it somewhat less obvious which theory of state tort law, if any, would provide the plaintiff in that case with an opportunity for relief. A plaintiff might also seek to recover

under an intentional infliction of emotional distress theory of recovery, but that cause of action has its own problems given that prison disciplinary measures regularly cause emotional distress by design.

These are not isolated examples, and the inquiry becomes even more complicated when a prisoner alleges an Eighth Amendment violation as the result of a combination of factors that may not, on their own, constitute a violation of state tort law. *See Wilson v. Seiter*, 501 U.S. 294, 304 (1991) ("Some conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets." (emphasis omitted)). Indeed, this very problem of identifying whether state common law provides a remedy is likely to arise any time constitutional and state common law regulate similar conduct in different ways.

The dissent argues that these obvious difficulties are irrelevant because Pollard's injuries are "certainly * * * covered by state tort law." Dissenting Op. at 19727. But this decision will have implications far beyond Pollard's suit. Under the GEO employees' proposed framework, as adopted by the dissent, in each case a court would need to identify whether state remedies provide relief for the plaintiff's particular claim. While in some instances that may prove an easy task, in others, like those identified above, it may be quite difficult. For questions of first impression, it would require a

federal court to examine: (1) state common law, (2) state statutes, (3) state administrative regulations, (4) state constitutional provisions, (5) procedural requirements attendant to each alternative claim (including statutes of limitations, exhaustion requirements, etc.), and (6) the existence of a cause of action to enforce state law. Furthermore, under the GEO employees' proposed framework, courts would potentially need to consider whether a plaintiff's claims would be frustrated by any viable defenses under state law. For example, a privately operated prison might assert the "government contractor" defense if sued under state tort law. *See Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988) (recognizing a defense immunizing federal contractors from liability where the contractor has conformed its behavior to precise government specifications and, if necessary, has warned the government of risks posed by those specifications).[16]

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[16] The dissent states that there "is no reason to think that * * * the government contractor defense * * * is applicable here." Dissenting Op. at 19727. But there is no way to know on the record before us whether or not that is the case. *Cf. Malesko*, 534 U.S. at 74 n.6 (noting that "[t]he record here would provide no basis for [the government contractor] defense"). The district court did not require GEO or its employees to file any response to Pollard's suit before determining that his *Bivens* claim was precluded by alternative state tort remedies. This is not unusual. Under 28 U.S.C. § 1915A, when a *Bivens* action is filed by a prisoner, the district court must pre-screen any such complaints and dismiss those actions that fail to state a claim upon which relief can be granted. Because the GEO employees were not required to respond to Pollard's complaint, we have no idea whether they could pursue the government contractor defense were Pollard's claims to be tried under state tort law. Nor do the GEO employees have any incentive to make such an argument at this stage of the litigation, as their argument rests on the existence of adequate alternative remedies under state

Thus, unless such defenses are assessed prior to dismissing a *Bivens* action because of alternative state remedies, a prisoner in a privately operated facility may be foreclosed from relief, even though a prisoner housed in a governmentally run prison would have a cause of action. But, in the context of prisoner litigation, a court would often be required to make these types of determinations before the defendant has asserted any defenses or made any filing whatsoever (as was the case here). *See* 28 U.S.C. § 1915A (requiring federal courts to pre-screen prisoner civil rights claims).[17] It is also worth noting that, in light of the ever-rising percentage of federal inmates incarcerated in private prison facilities, federal courts would be increasingly asked to make these types of determinations.[18]

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tort law which would be foreclosed by the successful invocation of such a defense. Thus, the GEO employees may have a complete defense to liability under state tort law or they may not; we simply don't know.

[17] Another, closely related, example of one of these potential defenses is federal preemption. *See Saleh v. Titan Corp.*, 580 F.3d 1, 11-13 (D.C. Cir. 2009) (holding that plaintiffs state law tort actions against private military contractors working for the federal government were preempted by federal law).

[18] According to the United States Justice Department's statistics, as of year-end 2000, 10.7% of all federal prisoners were held in privately operated prisons. Bureau of Justice Statistics, U.S. Dep't of Justice, Prisoners in 2008 17, 38 (Dec. 2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf (recording 145,416 total federal prisoners as of December 31, 2000, of which 15,524 were housed in privately operated prisons). As of year-end 2008, that percentage was 16.5%, thus showing an increase of almost 6% in those eight years alone. *Id.* (recording 201,280 total federal prisoners as of December 31, 2008, of which 33,162 were housed in privately operated prisons).

[17] In sum, a *Bivens* cause of action for prisoners' Eighth Amendment claims would be fairly straightforward to apply. By contrast, it would be difficult to administer a regime where *Bivens* claims were allowed to proceed only when state law would offer no remedy. While these observations are by no means dispositive of the question here presented, under *Wilkie* we are bound to consider them in deciding whether to allow a "new" cause of action to proceed, "the way common law judges have always done." 551 U.S. at 554.

(b) Deterrence

[18] The Court has also looked to whether extending *Bivens* would undermine the "core purpose" of an implied cause of action: deterring individual officers from committing constitutional violations. *Malesko*, 534 U.S. at 74. Allowing a *Bivens* action to go forward here would not undermine that core purpose.

In *Meyer*, the Court declined to extend *Bivens* to permit suit against a federal agency, reasoning that plaintiffs could be expected to always choose to sue the federal agency over an individual who could assert qualified immunity as an affirmative defense. 510 U.S. at 485. To the extent that aggrieved parties would have "less incentive to bring a damages claim against individuals, 'the deterrent effects of the *Bivens* remedy would be lost.' " *Malesko*, 534 U.S. at 69 (quoting *Meyer*, 510 U.S. at 485). Thus, *Meyer* concluded that allowing a *Bivens* claim against federal agencies "would mean the evisceration of the *Bivens* remedy, rather than its extension." 510 U.S. at 485.

In *Malesko*, the Court echoed this reasoning in concluding that allowing *Bivens* suits to proceed against private prison corporations would undermine the deterrent effects of *Bivens*. 534 U.S. 70-71. According to the Court, "if a corporate defendant is available for suit, claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury." *Id.* at 71 (citing the plurality opinion and Justice O'Connor's dissent in *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993), for the proposition that corporations fare much worse before juries than do individuals). Thus, recognizing that corporations would likely bear the lion's share of responsibility for *Bivens* damages if subject to an implied cause of action under the Constitution, the Court concluded that the deterrence goals of *Bivens* would be undermined by such an extension. Whatever deterrent effect a suit against a corporation may have, the Supreme Court explicitly rejected the notion that corporate deterrence is relevant to the core deterrence goals of *Bivens*. *Id.* (stating that corporate deterrence "has no relevance to *Bivens*, which is concerned solely with deterring the unconstitutional acts of individual officers").

[19] The instant case does not present the same problems. It simply cannot be disputed that allowing *Bivens* suits against private prison employees would not undermine *Bivens*'s goal of deterring unconstitutional acts by individuals. The dissent argues that state tort remedies are "superior" to a *Bivens* remedy here, Dissenting Op. at 19721, and that allowing Pollard to bring a *Bivens* action would not serve *Bivens*' goal of deterrence, Dissenting Op. 19729. We disagree. It is true that state tort

remedies may often serve to deter unconstitutional conduct, and that it may be easier to prevail on such a claim than on an Eighth Amendment *Bivens* claim. Indeed, in an action to recover damages for personal injuries under state tort theories such as negligence or medical malpractice, the plaintiff would not be required to prove deliberate indifference, as required to establish an Eighth Amendment violation. *See Estelle*, 429 U.S. at 104. But while we acknowledge that the elements of a state tort claim may not be as demanding, we are not prepared to say that *Bivens* would have no marginal deterrent effect against individual employees of GEO.

For instance, in some states, a prisoner in Pollard's position must submit a declaration by a physician attesting that the suit is not frivolous. *See, e.g.*, Nev. Rev. Stat. § 41A.071 ("If an action for medical malpractice * * * is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit, supporting the allegations contained in the action, submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged malpractice."). It is unclear how a prisoner like Pollard, who filed this claim *in forma pauperis*, would be able to secure such a declaration. The Eleventh Circuit in *Alba* concluded that a similar certification requirement in Georgia did not render the inmate's state remedies ineffective because it merely placed him in "the same shoes as anyone else in Georgia filing a professional malpractice claim," under "no stricter rules than the rest of Georgia's residents." 517 F.3d at 1255. But federal courts have long recognized that inmates proceeding *pro se*

are not in the "same shoes" as other citizens. *See, e.g., Houston v. Lack*, 487 U.S. 266, 275 (1988) (creating the more lenient "prison mailbox rule"—deeming a document filed by a *pro se* prisoner "filed" as of the time the prisoner delivers it to prison authorities for mailing (rather than the time it is received by the court)—because "whereas the general rule has been justified on the ground that a civil litigant who chooses to mail a notice of appeal assumes the risk of untimely delivery and filing, a *pro se* prisoner has no choice but to hand his notice over to prison authorities for forwarding to the court clerk" (citation omitted)).

[20] Additionally, *Bivens* may allow for recovery of greater damages in some cases than a state tort law remedy. As discussed *infra*, were Pollard to bring a claim for medical malpractice under California law, there would be a cap on the amount of non-economic damages he could recover. *See* Cal. Civ. Code § 3333.2. There is no similar cap on non-economic damages under *Bivens*. Thus, for a truly egregious case of neglect or abuse, a medical professional at a privately operated prison would face significantly greater liability under *Bivens* than state tort law. Furthermore, to be entitled to punitive damages under California law, a plaintiff must demonstrate "oppression, fraud, or malice." Cal. Civ. Code § 3294. By contrast, once a plaintiff has successfully met the "deliberate indifference" standard under the Eighth Amendment—requiring that the conduct be "wanton," *Wilson v. Seiter*, 501 U.S. 294, 302 (1991) there is little more that such a plaintiff would need to prove to establish a convincing argument for an award of punitive damages. These significant differences in the potential liability faced by

privately operated federal prisons are prime examples of the "marginal deterrence" that *Bivens* offers. Thus, we do not find that this "special factor" counsels hesitation.

(c) Asymmetrical Liability Costs

The Court has also expressed concerns about imposing asymmetric liability costs on privately operated facilities as compared to government-operated facilities. *Malesko*, 534 U.S. at 72. We are equally concerned about issuing a decision that will yield disparate rights and remedies among inmates in private and public prisons. Unfortunately, under the current *Bivens* regime, asymmetries may remain irrespective of whether we recognize or deny a *Bivens* cause of action here.

[21] Unlike officers employed by public prisons, the GEO employees may not be entitled to qualified immunity, and as a result, prisoners asserting claims against them may be able to recover more often than their counterparts in governmentally run prisons. *Compare Richardson*, 521 U.S. at 401 (holding that employees of privately operated state prisons are not entitled to qualified immunity), *with Butz v. Economou*, 438 U.S. 478, 501 (1978) (holding that "federal officials should enjoy no greater zone of protection when they violate federal constitutional rules than do state officers" (emphases removed)), *and Holly*, 434 F.3d at 294 (stating that employees of privately operated federal prisons are not entitled to qualified immunity). We need not decide the issue of qualified immunity here.

[22] On the other hand, if we conclude that Pollard cannot bring a suit under *Bivens*, then *only* inmates in public prisons will be able to vindicate their

constitutional rights. Prisoners would thereby have entirely different rules governing their rights depending upon whether they are incarcerated in a public or private prison (and, for that matter, in which state the private prison is located). This outcome is equally undesirable. As asymmetries will persist irrespective of the outcome of this case, this consideration does not counsel hesitation in recognizing a *Bivens* remedy here.

IV. CONCLUSION

[23] We conclude that Pollard's suit under *Bivens* against the GEO employees for alleged violations of his Eighth Amendment rights should be allowed to proceed. We reach that conclusion because (1) the GEO employees act "under color of federal law" for purposes of *Bivens* liability; and (2) a faithful application of *Wilkie*'s two-part test counsels that state tort remedies alone are insufficient to displace *Bivens* and there are no "special factors counselling hesitation" in allowing Pollard's suit to proceed. We therefore reverse and remand to the district court for further proceedings consistent with this opinion. To the extent Pollard's appeal seeks to challenge the district court's dismissal of GEO from the lawsuit, we affirm the district court's disposition as to that issue.

AFFIRMED IN PART, REVERSED IN PART, REMANDED.

RESTANI, Judge, concurring in part and dissenting in part:

I agree that the district court properly dismissed GEO from the lawsuit and that employees of a private corporation operating a federal prison are

federal government actors. I conclude, however, that we would err by creating a split in the law of the various circuits by holding that a prisoner may maintain a cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against such employees where adequate state law remedies exist. Until now, the federal circuits that have addressed the issue have held correctly that a prisoner may not maintain such an action. *See Alba v. Montford*, 517 F.3d 1249 (11th Cir.), *cert. denied*, 129 S. Ct. 632 (2008); *Holly v. Scott*, 434 F.3d 287 (4th Cir.), *cert. denied*, 547 U.S. 1168 (2006); *Peoples v. CCA Det. Ctrs.*, 422 F.3d 1090 (10th Cir. 2005), *vacated in relevant part and aff'd by equally divided en banc panel*, 449 F.3d 1097 (10th Cir. 2006) (per curiam), *cert. denied*, 549 U.S. 1056 (2006) and 549 U.S. 1063 (2006). The evolution of the U.S. Supreme Court's *Bivens* jurisprudence confirms that this Court should follow their lead.

I. The Supreme Court has limited *Bivens* to cases in which no alternative remedy is available against the federal actor who committed the wrong.

The majority overlooks the reality that the Supreme Court has recognized *Bivens* causes of action only where federal officials, by virtue of their position, enjoy impunity, if not immunity, from damages liability because of gaps or exemptions in statutes or in the common law. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). In *Bivens*, the Supreme Court recognized an implied cause of action for damages under the Fourth Amendment against federal agents who illegally searched the plaintiff's home and arrested him. 403 U.S. at 389,

397. The Court acknowledged that a trespass tort action, which requires resistance that the plaintiff could not lawfully exert against federal agents, was unlikely to succeed because the agents obtained permission to enter the home. *Id.* at 394-95.

The Supreme Court has only extended *Bivens* twice, "to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct." *Malesko*, 534 U.S. at 70. First, the Court recognized a *Bivens* action under the equal protection component of the Fifth Amendment Due Process Clause against a former Congressman who had fired one of his employees based on her sex, *Davis v. Passman*, 442 U.S. 228 (1979), because the employee "lacked any other remedy for the alleged constitutional deprivation," *Malesko*, 534 U.S. at 67. As the statute protecting federal employees from sex-based discrimination, 42 U.S.C. § 2000e-16(a), does not extend to such congressional employees, and the employee did not have any cause of action under state law, "there [were] available no other alternative forms of judicial relief." *Davis*, 442 U.S. at 245 & n.23, 247. *Davis*, like *Bivens*, involved "a plaintiff in search of a remedy." *Malesko*, 534 U.S. at 74; *see Davis*, 442 U.S. at 245 ("For Davis, as for Bivens, it is damages or nothing." (internal quotation marks and citation omitted)). In both cases, "the plaintiffs' injuries would have gone entirely unredressed without an implied constitutional remedy." *Holly*, 434 F.3d at 295.

Second, the Supreme Court held that a prisoner could bring a *Bivens* action under the Cruel and

Unusual Punishments Clause of the Eighth Amendment against federal prison officials because the prisoner's only alternative remedy was a claim under the Federal Tort Claims Act ("FTCA") against the United States. *Carlson v. Green*, 446 U.S. 14 (1980). Although the FTCA applies only in instances where a private person would be liable under state law, 28 U.S.C. § 1346(b)(1), it precluded state tort actions against the individual federal officers, *Holly*, 434 F.3d at 296; *see* 28 U.S.C. § 2679(b)(1). Reasoning that actions against the United States under the FTCA would not sufficiently deter unconstitutional acts by individuals, the Court recognized a *Bivens* action "to provide an otherwise nonexistent cause of action against [the individuals]." *Malesko*, 534 U.S. at 70; *see also id.* at 74 (noting that the prisoner in *Carlson* sought "a cause of action against an individual officer, otherwise lacking").

Thus, the Supreme Court has recognized *Bivens* claims only "for want of other means of vindication," as "Davis had no other remedy, Bivens himself was not thought to have an effective one, and in *Carlson* the plaintiff had none against Government officials." *Wilkie v. Robbins*, 551 U.S. 537, 555 (2007). As the majority notes, the Court has set forth two-step test to determine whether to recognize new *Bivens* actions:

> In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: "the federal

> courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation."

Id. at 550 (citations omitted). Since *Carlson*, however, the Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68 (declining to recognize a *Bivens* action against a private corporation operating a federal prison).

II. The justifications for recognizing *Bivens* actions do not apply here.

A. Adequate alternative remedies are available to Pollard.

Here, ordinary state tort remedies for negligence or medical negligence against the GEO employees are an adequate, alternative, existing process for protecting Pollard's interest. Where, as here, the plaintiff has an alternative remedy against a federal official alleged to have acted unconstitutionally, the Supreme Court has "consistently rejected invitations to extend *Bivens*." *Malesko*, 534 U.S. at 70. Unlike *Bivens*, in which alternative state tort remedies were inadequate because the plaintiff's lack of resistance to the federal agents foreclosed a trespass action, Pollard's "claim of negligence or deliberate indifference requires no resistance to official action." *Id.* at 74. Additionally, employees of private prison corporations do not enjoy impunity or immunity as to damages because of gaps or exemptions in statutes or in the common law.

In fact, as the majority concedes, tort remedies for negligence and medical negligence may be even more

easily obtained than remedies under *Bivens* for an Eighth Amendment violation "because the heightened 'deliberate indifference' standard of Eighth Amendment liability would make it considerably more difficult for [a plaintiff] to prevail than on a theory of ordinary negligence."[1] *Malesko*, 534 U.S. at 73 (citations omitted). Thus, Pollard does not lack effective remedies because his "alternative remedies are at least as great, and in many respects greater, than anything that could be had under *Bivens*." *Id.* at 72. The state tort remedies for negligence or medical negligence are therefore a more than adequate alternative, existing process for protecting Pollard's interest. *See id.* at 72-74 (declining to recognize a *Bivens* action under the Eighth Amendment where the plaintiff had alternative remedies under state tort law for negligence and remedial mechanisms established by the Bureau of Prisons ("BOP")).[2]

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[1] Pollard could also sue GEO under a respondeat superior theory in tort, even though he cannot pursue a *Bivens* action against GEO under *Malesko*. *See Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*, 907 P.2d 358, 360 (Cal. 1995); *Chesterman v. Barmon*, 753 P.2d 404, 406 (Or. 1988) (en banc); *see also Alba*, 517 F.3d at 1256 n.7; *Holly*, 434 F.3d at 296.

[2] The majority notes that the alternative BOP administrative remedies that were available in *Malesko* do not appear to be available to Pollard. Maj. Op. at 19701-02 n.12. *Malesko*, however, only briefly mentioned BOP remedies and actually emphasized the availability of state tort remedies. *See* 534 U.S. at 72-74. Additionally, BOP remedies are not as relevant as tort remedies to the *Bivens* analysis because the BOP's administrative grievance remedies do not include damages. *See id.* at 74.

B. The availability of tort remedies is a convincing reason to refrain from recognizing a new damages remedy.

The availability of a superior alternative remedy is a convincing reason for the Judicial Branch to refrain from providing a new, freestanding damages remedy. *See Holly*, 434 F.3d at 295. Courts are reluctant to recognize new *Bivens* actions, which are implied without any Congressional authority, because " 'a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.' " *Id.* at 289 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004)); *see also Malesko*, 534 U.S. at 67 n.3 ("[W]e have retreated from our previous willingness to imply a cause of action where Congress has not provided one."). Rather, "[s]o long as the plaintiff ha[s] an avenue for some redress, bedrock principles of separation of powers foreclose[] judicial imposition of a new substantive liability." *Malesko*, 534 U.S. at 69. "The dangers of overreaching in the creation of judicial remedies are particularly acute where such remedies are unnecessary." *Holly*, 434 F.3d at 295. Because a *Bivens* action is unnecessary against the employees of a private prison corporation, we should not recognize such an action.[3]

III. The availability of a state tort remedy may preclude a *Bivens* action.

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[3] Although we have stated previously that "to the extent that [a plaintiff] sought recovery from individual employees of [a private corporation managing a federal prison], the case had to [be] brought as a *Bivens* action," that statement was pure dicta. *Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101, 1104 (9th Cir. 2004).

The majority's conclusion that the availability of state remedies is not a convincing reason for the judiciary to refrain from recognizing a *Bivens* remedy is based on the faulty premises that remedies that preclude *Bivens* must (1) be crafted by Congress and (2) "appl[y] uniformly throughout the republic." *Castaneda v. United States*, 546 F.3d 682, 701 (9th Cir. 2008), *rev'd on other grounds sub nom. Hui v. Castaneda*, __ S. Ct. __, 2010 WL 1740524 (May 3, 2010). The first is wrong because the Supreme Court actually has considered remedies not crafted by Congress, and *Malesko* itself is one instance in which the Court declined to recognize a *Bivens* action because of state remedies. The second is wrong because the need for uniformity is not particularly compelling where the persons who harmed the plaintiff are private employees of a private entity.

A. The Supreme Court has declined to recognize a *Bivens* action because of state remedies.

Recent Supreme Court precedent makes clear that a state tort remedy may be an alternative, existing process that precludes recognition of a *Bivens* action. In *Malesko*, the Court "consider[ed] availability of state tort remedies in refusing to recognize a *Bivens* remedy." *Wilkie*, 551 U.S. at 551. The Court also has "rejected the claim that a *Bivens* remedy should be implied simply for want of any other means for challenging a constitutional deprivation in federal court." *Malesko*, 534 U.S. at 69. Thus, an alternative remedy need not be a federal remedy. *See id.*; *Alba*, 517 F.3d at 1254.

There is some tension between *Malesko* and other recent Supreme Court cases, and *Carlson*, which suggested that the only kind of alternative remedy

that could defeat a *Bivens* claim was one provided by Congress "which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Carlson*, 446 U.S. at 18-19; *see also Peoples*, 422 F.3d at 1097, 1102 (noting that recent cases suggest that *Bivens* is presumptively unavailable, whereas *Carlson* suggested that a *Bivens* claim is presumptively available). The tension, however, can be resolved by understanding the *Carlson* formulation as a "test for express *Bivens* preemption" by a statute. *Castaneda*, 546 F.3d at 689, *rev'd on other grounds*, __ S. Ct. __, 2010 WL 1740524. *Malesko*, which did not involve any statute, did not discuss this test. The Supreme Court has determined that alternative remedies that are not expressly authorized by Congress and are not an equally effective substitute nonetheless may preclude a *Bivens* remedy. *See Bush v. Lucas*, 462 U.S. 367 (1983). More recently, in a case in which express statutory preemption was not at issue, the Supreme Court has stated that it will not recognize a new *Bivens* action if "*any* alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain." *Wilkie*, 551 U.S. at 550 (emphasis added). Finally, even if *Carlson* and *Malesko* are truly irreconcilable, we should follow the most recent Supreme Court precedent, *Malesko*. *Holly*, 434 F.3d at 303 (Motz, J., concurring in the judgment); *Peoples*, 422 F.3d at 1102.

The majority's statement that in *Wilkie*, the existence of an alternative state remedy alone was not sufficient to preclude a *Bivens* action, Maj. Op. at 19704, is misleading. Rather, in *Wilkie*, the Supreme

Court considered that the plaintiff had "an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints" for torts, improper criminal charges, unfavorable agency actions, and other offensive behavior by the Bureau of Land Management. 551 U.S. at 551, 553. The Court, however, found that the plaintiff functionally did not have a remedy for his true complaint regarding the agency's course of dealing as a whole because "the forums of defense and redress open to [the plaintiff] are a patchwork, an assemblage of state and federal, administrative and judicial benches applying regulations, statutes and common law rules." *Id.* at 554-55. It is too much of a stretch to infer, as the majority does, that if the plaintiff had merely complained of one or more torts, the Court would have reached the same result. To the contrary, the Court noted that "when the incidents are examined one by one, [the plaintiff's] situation does not call for creating a constitutional cause of action for want of other means of vindication." *Id.* at 555. Further, the *Wilkie* Court concluded that, even where the remedies available are a patchwork, the need for a *Bivens* remedy is not particularly compelling, as "[i]t would be hard to infer that Congress expected the Judiciary to stay its *Bivens* hand, but equally hard to extract any clear lesson that *Bivens* ought to spawn a new claim." *Id.* at 554.

B. The need for uniformity is not compelling here.

Uniformity of liability is sometimes important to a *Bivens* analysis. In *Carlson*, the Supreme Court stated that "the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules" and that "[t]he question

whether [an] action for violations by federal officials of federal constitutional rights should be left to the vagaries of the laws of the several States admits of only a negative answer in the absence of a contrary congressional resolution."[4] *Carlson*, 446 U.S. at 23. Specifically, the Court concluded that a uniform federal rule of survivorship for Eighth Amendment *Bivens* claims was necessary where one state's law would permit survival of the claims but another would not. *Id.* at 23-24. Essentially, state law previously had dictated whether the prisoner's claim died with him.

Here, however, the need for uniformity of rules is much less compelling. First, although employees of a private corporation operating a federal prison may be government actors, they are not federal officials and do not have the same immunities as federal officials. Second, ordinary negligence and medical negligence causes of action are already universally available against employees of a private corporation operating a federal prison, and the elements of such common law derived causes of action are fundamentally the same in every state.

Unlike in *Carlson*, no individual state law forecloses or extinguishes such actions altogether, although many states have enacted various procedural hurdles and limits on noneconomic

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[4] Following *Carlson*, this Circuit in *Castaneda* stated that the FTCA is an inadequate alternative to *Bivens* because "[w]e do not believe that Congress intended to delegate to the states the mechanism by which violations of federally established rights are remedied," and that "[w]e are aware of no case holding a remedial scheme that is entirely parasitic on state law to be a substitute for a *Bivens* remedy." 546 F.3d at 701, *rev'd on other grounds*, __ S. Ct. __, 2010 WL 1740524.

damages in medical malpractice suits. *Castaneda*, 546 F.3d at 690-91, *rev'd on other grounds*, __ S. Ct. __, 2010 WL 1740524. The majority points to the differences between the California and Oregon statutes of limitations and the fact that Pollard's medical malpractice claim would be subject to a non-economic damages cap under California law but not under Oregon law. Maj. Op. at 19706-07. These differences, however, should not be determinative, as an alternative remedy need not provide complete relief for the plaintiff. *See Bush*, 462 U.S. at 388. Rather, as the Eleventh Circuit has held, "[t]hat state procedural rules complicate the filing of a lawsuit does not mean that a plaintiff lacks *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct," and procedural hurdles in filing a state action do not "render state relief unavailable in the same vein in which the Supreme Court held it to be unavailable in *Bivens*." *Alba*, 517 F.3d at 1255 (internal quotation marks and citation omitted); *see also Peoples*, 422 F.3d at 1104-05 (stating that Supreme Court precedents do not mandate recognition of a *Bivens* action "simply because an alternative state law claim may be subject to a punitive damages cap to which a federal claim is not").

IV. Special factors also counsel hesitation in recognizing a new *Bivens* action.

The availability of an adequate alternative remedy should end the analysis. The court need not look at other special factors, such as whether extending the cause of action would: (1) be feasible, (2) serve *Bivens*'s deterrence goals, or (3) impose asymmetric liability costs. In any event, these factors do counsel hesitation here and certainly do not counsel in favor

of recognizing a new *Bivens* action, as the majority suggests.

A. Case-by-case *Bivens* determinations are feasible.

First, although a *Bivens* action under the Eighth Amendment for prisoners is a workable cause of action that is recognized already, allowing a *Bivens* action to go forward only where a plaintiff would otherwise have no alternative remedy is not unduly complicated. Rather, the Supreme Court appears to prefer case-by-case determinations of whether adequate alternative remedies exist to a blanket determination that *Bivens* is available to an entire class of plaintiffs. *See Wilkie*, 551 U.S. at 550, 554 (stating that the first step of the *Bivens* analysis involves determining "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages" and that the next step involves "weighing reasons for and against the creation of a new cause of action, the way common law judges have always done"). Thus, the Supreme Court has invited federal courts to determine whether an alleged Eighth Amendment violation has a state law analogue and apply *Bivens* only if there is no such state analogue.

Further, the current system of determining whether a state analogue exists is easy to administer because there is unlikely to be an instance in which an Eighth Amendment violation by a private prison employee is not a tort. An Eighth Amendment violation requires a " 'sufficiently serious' " condition and " 'deliberate indifference' to inmate health or safety." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

Tort law similarly imposes a duty of care on jailers or prison employees to protect the life and health of prisoners in their custody and protect the prisoners from foreseeable harm or unreasonable risk of physical harm. *See, e.g., Giraldo v. Dep't of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371, 382-87 (Cal. Ct. App. 2008); Restatement (Second) of Torts § 314A(1)(a), (4), illus. 6 (1965). Breach of this duty may give rise to a negligence claim. *See Giraldo*, 85 Cal. Rptr. 3d at 390.

The majority does not contend that the acts alleged here fall into the category of acts that violate the Eighth Amendment but are not covered by state tort law, and that is not the case. California, Oregon, and every other state recognize the torts of negligence and medical negligence. The tort of negligence also covers Pollard's allegation that the prison employees deprived him of food while his arms were in casts, as numerous cases recognize that the keeper of a jail has a common law duty to provide prisoners with food. *See, e.g., Farmer v. State ex rel. Russell*, 79 So. 2d 528 (Miss. 1955); *Richardson v. Capwell*, 176 P. 205, 208 (Utah 1918); *Dabney v. Taliaferro*, 25 Va. (4 Rand.) 256 (1826).

There is no reason to think that either federal preemption or the government contractor defense, which the majority mentions, is applicable here. No federal law expressly or impliedly preempts or directly conflicts with a state tort of negligence or medical malpractice here, and federal law does not occupy the field governing private corrections employees' actions. The government contractor defense is not likely to apply because there is no indication that the United States directed the GEO employees' treatment of Pollard. *See Malesko*, 534

U.S. at 74 n.6 (noting that "[t]he record here would provide no basis for such a defense," which is available when "the government has directed a contractor to do the very thing that is the subject of the claim").[5]

Because the conduct at issue here certainly is covered by state tort law, the other examples the majority posits that may violate the Eighth Amendment of the Constitution but may not be covered by tort law are inapposite. In any event, I am not convinced that any of these acts—denying a prisoner access to a toilet and thus exposing the prisoner to human waste for thirty-six hours, depriving a prisoner of basic necessities, completely depriving a prisoner of outdoor exercise for a period of years, and exposing a prisoner to other unhygienic conditions—would not be covered by tort law. Rather, each act involves a clear breach of the duty of reasonable care and would unreasonably jeopardize a prisoner's health. *See Irabor v. Perry County Corr. Ctr.*, No. 06-0483-BH-C, 2008 WL 1929965, at *2-3 (S.D. Ala. Apr. 30, 2008) (holding that a plaintiff had adequate state tort remedies available to redress the denial of "basic necessities such as socks, toilet paper, and soap"); *Miller v. Owsley*, 422 S.W.2d 39, 43 (Mo. 1967) (recognizing that a police officer fails to act with due care if the officer confines a prisoner in an unfit and unsanitary place); *Richardson*, 176 P. at 208 (stating that the keeper of a jail has a common law duty to keep the jail warm and sanitary); *Dabney*, 25 Va. (4 Rand.)

[5] Because there is no reason to think that these defenses apply, I do not share the majority's concern about the district court's dismissal of the case pursuant to 28 U.S.C. § 1915A before the defendants made any filing.

256 (holding that under common law, a jailor has a duty to provide a prisoner with necessary supplies, such as fuel for heat and bed covering); *see generally* M. L. Schellenger, Annotation, *Civil Liability of Sheriff or Other Officer Charged with Keeping Jail or Prison for Death or Injury of Prisoner*, 14 A.L.R.2d 353, § 9.

B. Recognizing a *Bivens* action here would not deter individual officers.

Second, as the majority recognizes, state tort liability deters private prison officials from wrongdoing and may even provide more relief for Pollard than the Eighth Amendment would because the deliberate indifference standard for Eighth Amendment claims creates a high bar to hurdle. Maj. Op. at 19713. This undermines the deterrence analysis. Because "[t]he purpose of *Bivens* is to deter individual federal officers from committing constitutional violations," *Malesko*, 534 U.S. at 70, the purpose of *Bivens* is not served where, as here, state law already allows for compensatory and punitive damages for the same conduct, *Peoples*, 422 F.3d at 1105. In such an instance, a *Bivens* action is unnecessary. *See id.* Further, it is difficult to see how potential procedural differences in state laws or between the state and federal law would figure into deterrence as a practical matter. As discussed *supra*, the court should hesitate to create an unnecessary judicial remedy. *See Holly*, 434 F.3d at 295.

C. Declining to recognize a *Bivens* action here would avoid concerns about asymmetrical liability costs.

Finally, declining to recognize a *Bivens* action here would avoid the concerns that the Supreme Court

has expressed about imposing asymmetrical liability costs. *See Malesko*, 534 U.S. at 72. Although declining to recognize a *Bivens* action would perpetuate an existing public-private asymmetry because *Bivens* actions are permitted against federal prison employees but not private prison employees, declining to create a *Bivens* action would not "*impose* costs on one wrongdoer and not another." *Peoples*, 422 F.3d at 1103 (emphasis added). By contrast, recognizing that a plaintiff may pursue both a *Bivens* action and a tort action against private prison employees may impose asymmetrical liability costs, as a plaintiff currently may assert tort claims against private prison employees, while *Bivens* actions allow for recovery from federal employees where the FTCA otherwise bars tort claims against them. *See Malesko*, 534 U.S. at 72-73 (noting that "federal prisoners in private facilities enjoy a parallel tort remedy that is unavailable to prisoners housed in government facilities"); *see also Peoples*, 422 F.3d at 1103. Indeed, as the majority notes, plaintiffs may be able to recover from private prison employees more often than from federal prison employees because private prison employees may not be entitled to qualified immunity. *See Richardson v. McKnight*, 521 U.S. 399, 401 (1997).

V. Conclusion

I would join with other circuits in concluding that a *Bivens* cause of action is not available against employees of privately-run prison corporations where, as here, state tort laws provide a remedy. Accordingly, I respectfully dissent in part.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RICHARD LEE POLLARD

V.

WACKENHUT,

JUDGMENT IN A CIVIL CASE

CASE NO: 1:01-CV-06078-OWW-WMW

XX — **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 6/7/07

Victoria C. Minor
Clerk of the Court

Entered: June 7, 2007

By_: /s/ T. Lundstrom
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD LEE POLLARD, Plaintiff, vs.	CV F 01 6078 OWW WMW P
WACKENHUT CORRECTIONAL CORP., et al., Defendants.	ORDER RE: FINDINGS & RECOMMENDATIONS (#17)

Plaintiff is a federal prisoner proceeding pro se and in forma pauperis in a civil rights action pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72-302.

On September 14, 2006, findings and recommendations were entered, recommending dismissal of this action for failure to state a claim upon which relief can be granted. Plaintiff was provided an opportunity to file objections within thirty days. Plaintiff failed to file objections. On October 18, 2006, Plaintiff filed a motion for summary judgment.

The Magistrate Judge recommended dismissal of this action for failure to state a claim upon which relief could be granted. Specifically, the Magistrate Judge recommended that a Bivens claim be precluded where Congress has provided an

alternative remedy. Correctional Services Corporation v. Malesko, 534 U.S. 61, 68-69 (2001)(declining to infer a constitutional tort remedy against a private corporation.); Libas Ltd. v. Carrillo, 329 F.3d 1128, 1130 (9th Cir. 2003)(precluding Bivens claims where Congress has provided an alternative remedy).

Plaintiff does not challenge the Magistrate Judge's reasoning. Plaintiff argues that this matter should be construed as a Federal Tort Claims Act case, and that judgment should be entered in his favor. Plaintiff attaches to his motion a claim form indicating that he filed a claim with the Bureau of Prisons on September 26, 2006. Plaintiff's motion does not comply with the procedural requirements for a motion for summary judgment. Plaintiff offers no legal argument, and provides no evidence that shows that he would prevail on the merits of this action.

In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(B) and Local Rule 73-305, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and proper analysis.

Accordingly, THE COURT HEREBY ORDERS that:

1. The Findings and Recommendations issued by the Magistrate Judge on September 14, 2006, are adopted in full; and

2. This action is dismissed for failure to state a claim upon which relief can be granted. The Clerk is directed to close this case.

IT IS SO ORDERED.

Dated: June 7, 2007

/s/ Oliver W. Wanger
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD LEE POLLARD,

Plaintiff,

vs.

WACKENHUT CORRECTIONAL CORP., et al.,

Defendants.

CV F 01 6078 OWW WMW P

FINDINGS & RECOMMENDATION

Plaintiff is a federal prisoner proceeding pro se and in forma pauperis in this civil rights action. Plaintiff seeks relief pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). This proceeding was referred to this court by Local Rule 72-302 pursuant to 28 U.S.C. § 636(b)(1).

A Bivens cause of action is a judicially created counterpart to 42 U.S.C. § 1983 for claims against federal officers. Since federal officials do not ordinarily act under color of state law, constitutional violations by federal officials are generally beyond the reach of § 1983. Bivens established that "victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." Bivens, 403 U.S. at 396.

This action proceeds on the first amended complaint. Plaintiff brings this action against individual defendants employed by Wackenhut

Correctional Corporation at the Federal Correctional Institution at Taft. FCI Taft is a federal correctional facility operated under contract for the U.S. Bureau of Prisons by Wackenhut. The defendants names in this action are employees of Wackenhut. Plaintiff brings this complaint against Wackenhut Corrections Corp., and "several unknown named agents." Plaintiff complaints of certain conditions of his confinement. Plaintiff specifically alleges that he was injured as a result of a wet and slippery floor in the butcher shop. Plaintiff also alleges facts that suggest he was subjected to inhumane conditions of confinement.

Plaintiff names the following individual defendants: Wackenhut Corrections Corporation; Margaret Minnici, Administrator of Health Services at Taft; Jonathan Akanno, a medical doctor at Taft, Robert Spack, a medical doctor at Taft, Marshall Lewis, a doctor employed a the Pacific Orthopedic Medical Group in Bakersfield; Bob Stiefer, Chief of Security at Wackenhut Correctional Corporation; John Uzzle, Food Services Supervisor at Taft; B. Maness, a Food Services Supervisor.

The incident that gives rise to this lawsuit occurred on April 7, 2001, while Plaintiff was working in the butcher shop. Plaintiff slipped on a cart "which was placed haphazardly" in front of the butcher shop door. Plaintiff was seen by medical staff, and placed in a bilateral sling. On April 9th, Plaintiff was x-rayed, and diagnosed with a possible fracture of both elbows. Plaintiff was referred to the orthopedic clinic in Bakersfield.

On April 12, 2001, plaintiff arrived at Receiving and Discharge for transportation to Bakersfield. Officer Williams directed Plaintiff to don a jumpsuit.

Despite Plaintiff's protestations of pain, he donned the jumpsuit. Williams also made Plaintiff wear a "black box" mechanical restraint device on his wrists, despite Plaintiff's statement regarding his medical condition. At the doctor's office, "they" refused to take the black box off of his wrists.

Between April 13 and April 18, 2001, Plaintiff was unable to carry his food tray. "Medical" failed to provide an alternative means for Plaintiff to receive his meals. Plaintiff was also unable to bathe himself. Plaintiff also alleges that "medical" reduced his medication and failed to respond to Plaintiff's needs.

On May 31, 2001, Plaintiff became aware that he was scheduled to work the following Sunday. On Saturday, Plaintiff appeared at sick call and explained to the nurse that he was not formally released by the doctor for work. The nurse advised Plaintiff to return to sick call on Wednesday. Plaintiff appeared for work on Sunday. Ms. Maness "forced" Plaintiff to work under the threat of being placed in Detention Segregation. He complaint to Ms. Maness about his condition. She directed Plaintiff to mop the kitchen floor. Plaintiff continued to work, at Ms. Maness's direction, for the next three days. Plaintiff's tasks included washing walls. Plaintiff eventually went to sick call, where the doctor informed him that "you should not have been permitted to work." Plaintiff was placed on two week unit restriction and light duty. Immediately after the two week restriction, Plaintiff was again forced to work in food service. The next Saturday, Plaintiff was directed to shovel manure in the baseball field.

On June 20, 2001, Plaintiff was again forced to wear the black box for a visit to an outside clinic. Plaintiff showed his injuries from the black box and

waist chain. The physcian, defendant Lewis, advised Plaintiff that "I am only responsible for the treatment of the initial injury, however, if you have an additional problem, you will have to consult with the institutional doctor."

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2); See Barren v. Harrington, 152 F. 3d 1193 (9th Cir. 1998).

Lawsuits against federal officials for constitutional deprivations that occur under color of federal law are actionable pursuant to Bivens. Like state prisoners suing under 42 U.S.C. § 1983, federal prisoners proceeding under Bivens may sue relevant officials in their individual capacity only. While this doctrine provides for private rights of action for violations of the Fourth Amendment, Bivens, 403 U.S, 388 (1971), the Eighth Amendment, Carlson v. Green, 446 U.S. 14 (1980), and the Fifth Amendment Due Process Clause, Davis v. Passman, 442 U.S. 228 (1979), the U.S. Supreme Court has been reluctant to extend Bivens to claims where Congress has already provided "an avenue for some redress." Correctional Services Corporation v. Malesko, 534 U.S. 61, 68-69 (2001)(declining to infer a constitutional tort remedy against a private corporation.); Libas Ltd. v. Carrillo, 329 F.3d 1128, 1130 (9th Cir. 2003)(precluding

Bivens claims where Congress has provided an alternative remedy).

In Malesko, the Supreme Court was confronted with a claim similar to the case before the court in this action. Malesko involved a Bivens claim against a private prison contractor for an Eighth Amendment violation. Chief Justice Rehnquist reviewed the background of Bivens, noting that it is a judicially created measure crafted to provide a remedy where none existed.

Chief Justice Rehnquist noted that the Supreme Court declined an invitation to extend Bivens to permit suit against a federal agency, even though the agency was otherwise amenable to suit. FDIC v. Meyer, 510 U.S. 484-486 (1994). The Court specifically held that

> From this discussion, it is clear that the claim urged by respondent is fundamentally different from anything recognized in *Bivens* or subsequent cases. In 30 years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct. Where such circumstances are not present, we have consistently rejected invitations to extend *Bivens*, often for reasons that foreclose its extension here.

Malesko, 534 U.S. at 70.

The only circuit courts that have addressed the issue since Mal[es]ko are the Tenth Circuit and the Fourth Circuit. Both courts, following Malesko, have

declined to extend Bivens to hold individual employees of a private corporation liable.

The Tenth Circuit, in Peoples v. CCA Detention Centers, 422 F.3d 1090 (10th Cir. 2005), refused to recognize a Bivens claim against individual employees of a private corporation housing pretrial detainees pursuant to a contract with the United States. The Peoples court followed the reasoning of Malesko that the purpose of Bivens is to provide an otherwise nonexistent cause of action against individual officers or to provide a cause of action for a plaintiff who lacked any alternative remedy. Peoples, 422 F.3d at 1099-1100. The plaintiff in Peoples, as did the plaintiff in Malesko, had an alternative remedy.

The Fourth Circuit, in Holly v. Scott, 434 F.3d 287 (4th Cir. 2006), *cert. denied* – U.S. – , 126 S.Ct. 2333 (2006), reiterated that the purpose of Bivens was to deter individual "federal officers" from committing constitutional violations. The court went on to hold that employees of a private corporation under contract with the Federal Government were not "federal officials, federal employees, or even independent contractors in the service of the federal government. Instead, they are employed by GEO, a private corporation." Id. at 292. The court emphasized that in the context of constitutional claims raised under 42 U.S.C. § 1983, courts have insisted that as a prerequisite to liability, the "conduct allegedly causing the deprivation of a right be fairly attributable to the state." Id. (*citing* Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982)). There was no suggestion in Holly, however, "that the federal government [had] any stake, financial or otherwise, in GEO. Nor [was] there any suggestion

that federal policy played a part in defendants alleged failure to provide adequate medical care, or that defendants colluded with federal officials in making the relevant decisions." Id.

The Fourth Circuit also expressed its reluctance to extend Bivens on the basis that Bivens * * * is a judicial creation" without legislative sanction. Id. As such, the court noted that the "danger of federal courts' failing to 'respect the limits of their own power' increases exponentially" with the extension of Bivens to such circumstances. Id. The court also recognized the availability of superior causes of action available to plaintiff under the state law of negligence and concluded that the extension of a judicially implied remedy was therefore inappropriate. Id. at 295-296.

Here, the facts alleged square with Malesko. Plaintiff names as defendants individuals working for a private correctional corporation for violations of his civil rights. This court finds the holdings of the Tenth and Fourth Circuit Courts of Appeal persuasive. This court too cannot ignore the reluctance of the United States Supreme Court to extend Bivens as Bivens is "implied without any express congressional authority whatsoever." Holly v. Scott, 434 F.3d 287, 290 (4th Cir. 2006). Further, as in Peoples and Holly, Plaintiff has alternative and superior remedies available to him in state court.[1]

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[1] Plaintiff may bring an action under the state law of negligence and for medical negligence. Ca. Civ. Code §§ 1714, 1714.8, 333.2, 352.3. As noted by the U.S. Supreme Court in Malesko, the Eighth Amendment deliberate indifference standard is heightened and more difficult to prevail on than a theory of ordinary negligence. Malesko, 534 U.S. at 74 (*citing* Farmer v. Brennan, 511 U.S. 825, 835 (1994)("[D]eliberate

In light of the existing alternative remedies available to Plaintiff, the court finds that extending Bivens would not provide Plaintiff with an otherwise nonexistent cause of action. Nor would extending Bivens deter future unconstitutional conduct by federal officers as the Defendants are employees of a private corporation. As such, the court finds that this case does not present circumstances warranting the extension of Bivens.

Accordingly, IT IS HEREBY RECOMMENDED that this action be dismissed for failure to state a claim upon which relief may be granted.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636 (b)(1)(B). Within thirty days after being served with these findings and recommendations, Plaintiff may file written objections with the court. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED

Dated: September 12, 2006	**/s/ William M. Wunderlich**
mmkd34	UNITED STATES MAGISTRATE JUDGE

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indifference describes a state of mind more blameworthy than negligence.")).

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD LEE POLLARD,
Plaintiff – Appellant,

v.

WACKENHUT, dba Taft Correctional Institution; et al.,
Defendants – Appellees.

FILED

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U.S. COURT OF APPEALS

No. 07-16112
D.C. No. CV-01-06078-OWW/WMW
Eastern District of California, Fresno

ORDER

Before: HUG and PAEZ, Circuit Judges, and RESTANI, Judge.*

The parties' joint motion to stay the mandate for 90 days pending a timely petition for writ of certiorari pursuant to Fed. R. App. P. 41(d)(2) and Ninth Circ. Rule 41-1 is GRANTED.

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* The Honorable Jane A. Restani, Judge of the United States Court of International Trade, sitting by designation.

OPPOSITION BRIEF

No. 10-1104

Supreme Court, U.S.
FILED
APR 11 2011
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In The
Supreme Court of the United States

MARGARET MINNECI, *et al.*,

Petitioners,

v.

RICHARD LEE POLLARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether individuals responsible for the medical care of federal inmates are federal actors for the purpose of the Eighth Amendment, given that *West v. Atkins*, 487 U.S. 40 (1988), holds that individuals responsible for the medical care of state inmates are state actors for the purpose of the Eighth Amendment.

2. Whether a federal inmate who has suffered a violation of his Eighth Amendment rights may, as approved in *Carlson v. Green*, 446 U.S. 14 (1980), seek damages from the responsible prison officials, or is barred from enforcing his constitutional rights simply because the prisoner happens to be housed in a private prison.

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STATEMENT

A. Facts

In 2001, Richard Lee Pollard was an inmate in a federal correctional facility located in Taft, California. The facility was operated by Wackenhut Corrections Corporation, a private corporation hired by the federal government to house federal prisoners.[1] On April 7 of that year, Mr. Pollard broke both his elbows in a single incident. In the ensuing weeks and months, the Defendants—all employees of the prison—violated Pollard's Eighth Amendment rights in at least four ways.

First, Pollard's access to medical care was conditioned on his compliance with irrational demands that caused him extreme pain. He was told that, in order to see a physician, he would have to change into a special jumpsuit and wear a "black box." Changing into the jumpsuit required Pollard to bend both his arms at the elbow, a movement that caused him severe and unnecessary pain. The black box was even worse. A black box is a handcuff-like device attached to a chain around an inmate's waist. The weight and positioning of the device force an inmate's hands down and arms together. For the average inmate, the device is tolerable. For a man with two broken elbows, however, the device is horribly cruel. For six and a half hours, the black box forced Pollard to hold his broken elbows in an awkward and tremendously painful position. Pollard vigorously protested this practice for the six and a half

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[1] After Mr. Pollard filed suit, Wackenhut changed its name to "The GEO Group." *See* Pet. App. 15a n.2.

hours he was forced to wear the device, only to be forced into the device again during a subsequent visit to the doctor. These measures were completely irrational and unjustified. Having broken both elbows, Pollard was in obvious pain and in no way a threat to anyone's safety.

Second, Pollard was denied basic medical care for his injury. The orthopedist who examined Pollard immediately after the accident ordered that one of his arms be placed in a posterior splint for several weeks. The splint would immobilize the arm, which was necessary for the arm to properly heal. Yet when Pollard returned to the prison, he was denied a splint because of staffing and facility limitations. As a result, Pollard's arm healed incorrectly, causing him pain and limitations in movement that remain with him to this day.

Third, long before Pollard regained even minimal movement of his arms, he was forced back on work duty. His work included tasks that were particularly painful to his arms. Thus, he was forced to sweep floors and shovel manure. Pollard's protestations of pain fell on deaf ears and his convalescence was further delayed.

Fourth, Pollard was denied basic access to food and hygiene for significant periods of time. With both arms virtually unusable, Pollard could not hold a food tray in the cafeteria and was forced to either go without food or sell his private property to obtain money to buy food from the commissary. Nor was Pollard able to clean his body in the shower or when using the toilet. These unacceptable condi-

tions were known to several of the defendants, but completely ignored.

B. Proceedings Below

After suffering these constitutional violations, Mr. Pollard filed an action for damages against the Wackenhut employees who had mistreated him.[2] Under 28 U.S.C. § 1915A, a magistrate judge prescreened the complaint to determine if it stated a claim upon which relief could be granted. Construing it as an action under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the magistrate judge recommended the claims be dismissed. The district court adopted this recommendation and Pollard, now acting with the assistance of counsel, appealed.

The Ninth Circuit reversed. The court held that Mr. Pollard's *Bivens* claims against the individual defendants may proceed because (1) the defendants were federal actors and (2) federal prisoners may bring *Bivens* actions against prison officers. The individual defendants petitioned the Ninth Circuit to rehear the case *en banc*, which the court denied. The Defendants then timely petitioned this Court for a writ of certiorari.

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[2] Pollard also filed suit against Wackenhut itself and one non-employee physician. Pollard did not appeal the dismissal of those claims and they are not at issue here. Pet. App. 16a n.5, 17a-18a n.6.

REASONS FOR DENYING THE WRIT

This case is unworthy of review for three reasons: First, the Ninth Circuit's federal action holding is consistent with the precedent of this Court and virtually every other lower court. Second, the case lacks sufficient factual development for this Court to make an informed decision on the *Bivens* issue. Third, the Ninth Circuit's *Bivens* holding is consistent with this Court's precedent.

I. THE NINTH CIRCUIT'S FEDERAL ACTION HOLDING IS CONSISTENT WITH SETTLED LAW THROUGHOUT THE NATION.

The Ninth Circuit held that employees of a private corporation charged with caring for federal inmates are federal actors. This holding is consistent with the law pronounced by this Court and faithfully applied throughout the nation. There is thus no reason for this Court to address the federal action issue.

In *West v. Atkins*, 487 U.S. 42 (1974), this Court held that individuals hired by state private prisons to care for inmates are state actors. In *West*, a state prisoner sued a physician hired by the prison to provide him medical care. The physician argued that he was simply a private individual, and thus not obliged to obey the Constitution. This Court disagreed, holding that if a private individual was given power over an inmate and then "misused his power, . . . the resultant deprivation was caused, in the sense relevant for state action inquiry, by the State's

exercise of its right to punish [the inmate] and deny him a venue independent of the State to obtain needed medical care." *Id.* at 55. To hold otherwise would allow states to escape Eighth Amendment restraints through a contractual sleight of hand.

Relying on *West v. Atkins*, lower courts have consistently held that private individuals under contract to care for or supervise state prisoners are state actors.[3] Though a state action case, *West* applies with equal force in the federal action context because the state and federal action tests are identical in all material respects.[4] This is as it should be, for "[t]he 'constitutional design' would be stood on its head if federal officials did not at least face the same liability as state officials guilty of the same constitutional transgression." *Carlson v. Green*, 446 U.S. 14, 22 (1980). Thus, in considering *Bivens* actions against

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[3] *See, e.g., Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459 (5th Cir. 2003); *Natale v. Camden Cnty. Corr. Facility*, 318 F.3d 575, 581 (3d Cir. 2003); *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996); *Conner v. Donnelly*, 42 F.3d 220, 225 (4th Cir. 1994); *Carswell v. Bay Cnty.*, 854 F.2d 454, 456-7 (11th Cir. 1988); *C.K. v. Northwestern Human Servs.*, 255 F. Supp. 2d 447, 450 (E.D. Pa. 2003); *Gabriel v. Corr. Corp. of Am.*, 211 F. Supp. 2d 132, 137-138 (D.D.C. 2002); *Herrera v. Cnty. of Santa Fe*, 213 F. Supp. 2d 1288, 1290 (D.N.M. 2002); *Palm v. Marr*, 174 F. Supp. 2d 484, 487 (N.D. Tex. 2001); *Kesler v. King*, 29 F. Supp. 2d 356, 370-371 (S.D. Tex. 1998); *Blumel v. Mylander*, 919 F. Supp. 423, 426-27 (M.D.Fla. 1996).

[4] *Brown v. Philip Morris, Inc.*, 250 F.3d 789, 800-801 (3d Cir. 2001); *Chin v. Bowen*, 833 F.2d 21, 24 (2d Cir. 1987); *Kitchens v. Bowen*, 825 F.2d 1337, 1340 (9th Cir. 1987); *Morast v. Lance*, 807 F.2d 926, 931 (11th Cir. 1987); *Miller v. Hartwood Apartments, Ltd.*, 689 F.2d 1239, 1243 & n.7 (5th Cir. 1982); *Warren v. Government Nat'l Mortgage Assoc.*, 611 F.2d 1229, 1232 (8th Cir. 1980).

guards at private prisons, almost every lower court that has considered the issue has found federal action to be present.[5]

One exception—indeed, the *only* exception—to this is *Holly v. Scott*, 434 F.3d 287 (4th Cir. 2006). In *Holly*, the Fourth Circuit held (over a vigorous dissent by Judge Motz) that employees of a private federal prison were not federal actors. *Holly* is an outlier, however. In the five years since the opinion was issued, *not a single circuit judge* has ever followed or even voiced support for *Holly*'s federal action analysis.

In the similar case of *Alba v. Montford*, 517 F.3d 1249, 1254 (11th Cir. 2008), for example, the Eleventh Circuit "assum[ed], without deciding" that federal action was present and ruled only on the availability of a *Bivens* action. This is perhaps not surprising, for Eleventh Circuit precedent is clear that "the concept of action under color of federal law for purposes of a *Bivens* action is almost identical to the doctrine of action under color of state law," *Morast v. Lance*, 807 F.2d 926, 931 (11th Cir. 1987), and

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[5] *Purkey v. Corrections Corp. Det. Ctr.*, 339 F. Supp. 2d 1145, 1151 (D. Kan. 2004) (allowing federal inmates' *Bivens* action against private prison employees); *Jama v. U.S. I.N.S.*, 343 F. Supp. 2d 338, 363 (D.N.J. 2004) (plaintiffs in privately run detention facility may assert a *Bivens* claim against guards); *Sarro v. Cornell Corr., Inc.*, 248 F. Supp. 2d 52, 61 (D.R.I. 2003) (private prison guards employed by corporation operating prison were federal actors for *Bivens* purposes). *See also Bender v. General Servs. Admin.*, 539 F. Supp. 2d 702, 707-08 (S.D.N.Y. 2008) (holding that employee of security company hired by the federal government to monitor government office was subject to *Bivens* action).

that a private person who "provide[s] medical care to inmates acts under color of state law." *Carswell v. Bay Cnty.*, 854 F.2d 454, 456-57 (11th Cir. 1988). Thus, the current law in the Eleventh Circuit holds that the defendants in this case would be federal actors.

The judges in the Ninth Circuit feel no differently. Judge Restani (sitting by designation) disagreed with the panel majority on the *Bivens* issue, but did *not* dispute the majority's federal action holding. In the very first sentence of her dissent, Judge Restani expressly agreed with the majority that "employees of a private corporation operating a federal prison are federal government actors." Pet. App. 52a-53a. Even the Ninth Circuit judges who dissented from the denial of rehearing *en banc* made no effort to defend (let alone adopt) *Holly*'s federal action holding. Pet. App. 12a n.8. (noting only that *Holly* was "also grounded" in the absence of federal action).

In sum, there is wide agreement in the federal courts that employees of private prison corporations are federal actors. The Ninth Circuit's opinion in *Pollard* applies this view and thus is in no need of review by this Court.

II. THIS CASE IS INSUFFICIENTLY DEVELOPED FOR THE COURT TO MAKE AN INFORMED DECISION ON THE *BIVENS* ISSUE.

Writs of certiorari do not issue every time two lower courts disagree. Nor should they, for not every

case is properly developed or situated for this Court to evaluate the legal issues in the case. While it is true that lower courts have disagreed about some of the issues presented in this case, the case is nonetheless a poor candidate for review because the record will prevent this Court from properly considering the availability of alternative remedies. Moreover, future opportunities for review are likely to be plentiful. The Court should therefore decline review.

A. The Record Does Not Contain Sufficient Information on Pollard's Alleged Alternative State Remedies.

The availability of a *Bivens* action is a question of judgment, *i.e.*, a "judgment about the best way to implement a constitutional guarantee." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). In looking for this "best way," this Court typically inquires into whether "any alternative, existing process for protecting the [constitutional guarantee] amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* To determine whether a *Bivens* action or an "alternative, existing process" is the "best way" to implement a constitutional right, this Court will naturally desire to have before it a record sufficient to the task. The record in Pollard's case falls far short of this.

The record in this case lacks any information pertaining to the actual—as opposed to hypotheti-

cal—availability of alternative remedies.[6] Because the district court dismissed this suit pursuant to its obligation to prescreen prisoner complaints, *see* 28 U.S.C. § 1915A, the Defendants have never filed an answer and neither party has taken any discovery. The existence of state remedies has been assumed but never litigated, a fact that will frustrate this Court's review.

For instance, one issue that routinely affects the availability of alternative remedies is the existence of a valid defense. The existence of a defense has long been important to this Court in determining whether alternative remedies are sufficient to displace a *Bivens* action. For example, in *Bivens* itself, the federal officers argued that the plaintiff "may obtain money damages to redress [the] invasion" of Fourth Amendment rights "by an action in tort." *Bivens*, 403 U.S. at 390. The Court rejected that remedy as a viable alternative, however, because the officers likely possessed the defense of consent. *Id.* at 394 (explaining that trespass is not actionable against a defendant who "demands, and is granted, admission to another's house"). Thirty years later in *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001), the Court turned away a *Bivens* plaintiff based on alternative remedies only after assuring itself that there was "no basis" for a defense that is sometimes available to government contractors.

The existence of a defense is a realistic possibility here. For example, Pollard's access to emer-

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[6] To be clear (and as explained in Part III), Pollard does not concede that alternative state remedies are relevant to his case, or if they are, that he has any such remedies.

gency medical care was made contingent on his submission to the "black box." If Pollard brought some type of tort claim for his injuries, it is entirely possible that the claim would be foiled the defense of consent. From the current record, however, there is simply no way to determine this. As such, any inquiry into Pollard's alternative remedies will be merely hypothetical, which is hardly the proper way for this Court to make a "judgment about the best way to implement a constitutional guarantee." *Wilkie*, 551 U.S. at 550.

Instead of issuing a writ of certiorari in this case, the Court should wait for a case where state law tort claims have been litigated on the facts. For instance, just days ago, the Eastern District of North Carolina ruled in *Phillip v. Geo Group*, 2011 WL 1297606 (E.D.N.C. Mar. 31, 2011) that, even though a prisoner's *Bivens* claims against private prison officers were barred, his tort claims could proceed. The prison officers had filed a motion for summary judgment attacking the factual predicate of the prisoner's tort claims, but the court denied the motion. The case is now set for further proceedings, and the record produced in such an action will undoubtedly be superior to the record in the instant case. The record in *Phillip* or a similar case will allow this Court to know *for certain* whether alternative remedies exist, and if they do exist, their exact nature and scope.

There is little point in taking this case if a key issue—the availability of alternative remedies—is simply a matter of conjecture. This Court should not make law for the entire nation without a record that,

at a minimum, contains information on the actual availability of a prisoner's alternative remedies. The Court should thus decline review.

B. Future Opportunities for Review Will Be Plentiful.

As this Court well knows, there is no shortage of prisoners seeking review of their claims. Whether owing to pervasive mistreatment or not, federal prisoners routinely sue prison officials and subsequently seek review in this Court. The Defendants nonetheless claim that this Court will be starved for opportunities to review this issue. Pet. 29-32. This is simply not true.

If a defendant loses in the district court, the Defendants first argue that appeals to this Court will be unlikely because losing defendants will not be able to appeal until after a final judgment has been issued. Pet. 30. This is true, but it is hardly a reason for this court to jump at this case. If the issue presented here is of the importance the Defendants claim, it cannot be said that losing defendants will fail to seize further opportunities to litigate the issue at an appellate level. The Defendants argue in the alternative that, even if losing defendants will appeal, the appeal might not yield a *Bivens* holding because the court might resolve the appeal "on other grounds." Pet. 30. This is only possible in certain narrow circumstances, however. If the appeals court wishes to affirm he judgment below, it *must* resolve the *Bivens* issue. Even if the court wishes to reverse the judgment below on a non-*Bivens* ground (such as trial error), the court will *still* have to resolve the *Bi-*

vens issue for application on remand. It is only reversals without remands, therefore, that *might* preclude appellate review. This situation will occur on occasion, but that is hardly a reason to expect appeals to this Court to dry up—especially when appeals by losing plaintiffs are taken into account.

If a plaintiff loses in the district court, the Defendants first argue that the plaintiff may not elect to appeal. Pet. 31. This is of course a possibility, but federal appellate judges will surely confirm that prisoners are not shy about appealing. The Defendants further argue, however, that even if a losing plaintiff does appeal, consideration of the *Bivens* issue on appeal will be precluded "[i]f the defendant prevails on additional grounds applicable to all claims," such as "state law claims." Pet. 31.

What this argument misses, however, is that if a plaintiff loses in the district court on both *Bivens* and state law claims, the court of appeals will *still* be called on to determine whether a *Bivens* action is available. An appellate court cannot affirm the lower court's ruling without specifically addressing the *Bivens* issue because the plaintiff's argument will be that *Bivens* is a freestanding remedy available without regard to state law. Simply addressing state law rulings will not dispose of this claim. Even if the appellate court desires to reverse the lower court only on its state law ruling, the appellate court would still have to addressing the *Bivens* issue because the lower court would require instructions on how to handle the *Bivens* claim on remand.

III. THE NINTH CIRCUIT'S *BIVENS* HOLDING IS CONSISTENT WITH THIS COURT'S PRECEDENT.

The Ninth Circuit held that a federal prisoner may sue prison officials who violate his constitutional rights, despite the alleged availability of alternative state remedies. This conclusion is correct because (1) it falls squarely within *Carlson v. Green*, 446 U.S. 14 (1980), (2) state remedies are irrelevant in Eighth Amendment *Bivens* actions against federal actors and (3) even if state remedies were relevant, Pollard does not possess such remedies. The Ninth Circuit's decision is therefore in no need of review.

A. *Carlson v. Green* Permits This Action.

Mr. Pollard's *Bivens* action is, in all material respects, identical to that approved in *Carlson v. Green*. In *Carlson*, this Court held that a federal prisoner may seek damages from prison officers for their violations of the Eighth Amendment. In this action, *Pollard*, a federal prisoner, is seeking damages from prison officers for their violations of the Eighth Amendment. The Ninth Circuit's approval of Mr. Pollard's suit thus falls squarely within the holding of *Carlson*.

Carlson undeniably remains good law. A few terms ago in *Wilkie v. Robbins*, 551 U.S. 537 (2007), the Court summarized its *Bivens* holdings. Citing *Carlson*, the Court stated without reservation that a *Bivens* action is available "for an Eighth Amendment violation by prison officials." *Id.* at 550. Two sen-

tences later, the Court, citing *Correctional Services Corporation v. Malesko*, 534 U.S. 61 (2001), explained that it has "held against applying the *Bivens* model to claims . . . against private prisons." *Wilkie*, 551 U.S. at 550. The juxtaposition of these statements within the same paragraph is telling: On one hand, "an Eighth Amendment violation by prison officials" is grounds for a *Bivens* action, while on the other hand, *Bivens* actions "against private prisons" are barred. The conclusion is thus inescapable: *Bivens* actions against prison officers, as approved in *Carlson*, remain available.

Despite *Carlson*, the Defendants claim that "the Ninth Circuit extended *Bivens* to a brand-new area not authorized by this Court's precedents: claims against private citizens who are not federal officers but are employees of a private entity that contracts with the federal government." Pet. 20. This argument fails because the so-called "private citizens" sued here are quite plainly federal actors. Every citizen of the United States—whether an employee of a government or a private corporation—retains the status of "private citizen" when tending to their personal business. Where a private citizen acts on behalf of the state, however, the citizen steps into the role of state actor. It is the person's "*function* within the state system, not the precise terms of his employment, that determines whether his actions can fairly be attributed to the State." *West*, 487 U.S. at 55-56 (emphasis added). Were the law otherwise, the state and federal action inquiries would simply require an inspection of a defendant's W2 tax form. This is hardly the content of the law in this area.

The function of the Defendants in this case—whether one calls them "private citizens" or not—was to care for a federal prisoner. The federal government "has a constitutional obligation, under the Eighth Amendment, to provide adequate medical care to those whom it has incarcerated." *Id.* at 54. When a private citizen steps into this role, he becomes a federal actor. Not only is this the law pronounced by the Supreme Court, but as noted in Part I, *supra*, it is the law overwhelmingly applied in the lower courts.

Once the petitioners are seen for what they are—federal actors—it becomes clear that the Ninth Circuit did not "extend[]" *Bivens* in any way. The Ninth Circuit held that a federal prisoner may sue federal actors for a violation of his Eighth Amendment rights. That is the exact holding of *Carlson* and the Ninth Circuit's decision is thus an application of settled *Bivens* doctrine, not an extension of it.

B. The Existence of State Remedies Is Irrelevant.

The Defendants argue that this action is barred because Mr. Pollard possesses an "adequate state law tort remedy." Pet. 18. Even if it were true that he had such remedies (a point disproved in Part III.C, *infra*), the existence of these remedies is irrelevant to the case at bar. This is so for two reasons: (1) alternative remedies are only relevant where an extension of *Bivens* is sought and (2) the logic of this Court's *Bivens* jurisprudence makes only *federal* alternative remedies relevant.

1. The supposed importance of alternative remedies to this case stems largely from statements by this Court in *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001). The relevant portion of *Malesko* is as follows:

> In 30 years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct.

The Defendants argue that Mr. Pollard does not lack "any alternative remedy," and thus that his *Bivens* action is barred. Pet. at 16-20. As the above quote shows, however, this argument misreads *Malesko*.

Malesko spoke of alternative remedies *only* in the context of "extend[ing]" *Bivens*. The Court *did not* reverse or modify any of its prior cases holding *Bivens* actions available. Thus, the Court's holding in *Bivens*—that a damages action for a Fourth Amendment violation existed "regardless of whether [state law] . . . would prohibit or penalize the identical act"—was not in any way altered by *Malesko*. 403 U.S. at 391. Nor was the holding in *Carlson*—that federal prisons make bring Eight Amendment claims against prison officers—altered by *Malesko*. Both cases continue to be applied in the Supreme

Court and lower courts without a case-by-case inquiry into the existence of alternative remedies.

Only where the Court is deciding whether to "extend" *Bivens* does the existence of alternative remedies become relevant. But as made clear above, Pollard's case is not an extension of *Bivens*; it is simply an ordinary application of *Carlson*. The alleged existence of alternative remedies is thus irrelevant.

2. Even if Pollard's suit represented an extension of *Bivens*, however, his suit would still not be barred by alternative remedies. This is because remedial alternatives, to displace a *Bivens* action, must derive from the choice of Congress, not the states.

In implying a damages action directly from the Constitution, this Court has been especially mindful of Congress' shared role in choosing how the Constitution shall be enforced. Congress quite clearly has the authority to create a damages action against federal officers, and has done just that against state officers with 42 U.S.C. § 1983. Thus, in *Bivens* itself, the Court was careful to imply the cause of action only in the "absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396.

Such "affirmative action" can come in two forms. First, if Congress "explicit[ly] . . . declar[es] that persons injured by federal officers' [constitutional] violations" may not resort to a *Bivens* action, the action will obviously be unavailable. *Carlson*, 446 U.S. at 19; *see also Bush v. Lucas*, 462 U.S. 367,

378 (1983) (inquiring into whether Congress "expressly den[ied]" a *Bivens* action in the federal employment setting).

Second, even where Congress has not explicitly barred a *Bivens* action, it can impliedly bar an action by enacting a comprehensive remedial scheme addressing the wrong in question. For example, in *Bush v. Lucas*, this Court rejected a *Bivens* claim by a federal employee because the employee's First Amendment claim was covered by an "elaborate, comprehensive scheme" designed by Congress to address "the First Amendment claims raised by [the employee]." 462 U.S. at 385-86. Similarly, in *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988), the Court barred a plaintiff from pursuing social security benefits in a *Bivens* action because "Congress . . . has addressed the problems [alleged by the plaintiff] through the creation of wide-ranging administrative remedies." Even in *Malesko*, where the Court mentioned a state remedy, the Court was careful to point out the availability of a federal "Administrative Remedy Program." 534 U.S. at 73-74. This program, when measured against "bedrock principles of separation of powers foreclosed judicial" creation of a new cause of action. *Id.* at 69.

This Court has *never* held that a state remedy alone can bar a *Bivens* action. This should not be surprising because it is Congress—not the states—whose shared interest in constitutional enforcement is at stake when the federal courts imply a *Bivens* action. *Bivens* actions, by definition, seek the enforcement of *federal* constitutional law against *federal* officers. No state has designed—or could de-

sign—an "elaborate, comprehensive scheme" to address constitutional violations by federal officers. Regulation of federal officers is the prerogative of the federal government, and it is thus only appropriate that federal remedies, not state remedies, displace a *Bivens* action.

C. Mr. Pollard Does Not Possess Adequate Alternative Remedies.

Even if Mr. Pollard's suit falls outside *Carlson v. Green*, and even if state remedies can displace a *Bivens* action, the Ninth Circuit's decision is still correct because Pollard does not possess adequate alternative remedies.

The Defendants claim that "Pollard has an adequate state law tort remedy." Pet. at 18; 19. Tellingly, however, they *never* discuss that remedy in any detail. About the closest the Defendants come to explaining Pollard's remedy is to quote Judge Restani's unsubstantiated claim that Pollard has the "most fundamental of tort claim, [one] in which one person's negligent conduct causes physical and/or emotional harm to another." Pet. 19. Missing from this claim is any citation of authority holding that Pollard *actually* has a state law claim for relief.

When one digs into the specific facts of Pollard's case, one sees that this his claim for relief under state law is either murky or altogether nonexistent. It is true that tort law extends into the prison context, *see Giraldo v. Dept. of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371 (Cal. Ct. App. 2008), but it can hardly be said that the content of tort law is un-

affected by the prison context. For example, an ordinary citizen must normally respect a person's "apparent wishes to avoid intentional bodily contact." DAN B. DOBBS, THE LAW OF TORTS § 29 (2000). Within a prison, however, a prisoner's "apparent wishes" to be left alone are obviously far less powerful. In short, what might look like a tort in an ordinary setting may not be a tort inside the prison walls.

Consider Pollard's claim that he was forced to work before his arms healed. Forcing an injured prisoner to work is an Eighth Amendment violation, but one would search the reporters in vain for an applicable tort. The same goes for Pollard's claims related to food and hygiene. The Eighth Amendment entitles prisoners to minimum levels of nutrition and hygiene, but one would be hard pressed to locate a tort cause of action for such harms. When it comes to forced labor or access to life's necessities, ordinary tort law simply comes up short.

Consider as well Pollard's claim that he was forced to submit to the painful and useless "black box" device simply to receive emergency care. This allegation undoubtedly states an Eighth Amendment claim, but whether it states a claim in tort is far from clear. As noted above (*see* Part II.A), one significant risk for Pollard is the defense of consent. Pollard grudgingly consented to wearing the black box because he was desperate for emergency medical care. Any tort suit by Pollard would thus have to overcome this formidable defense.

In the ten-year history of this case, no party or judge has ever cited any precedent holding that Pol-

lard's federal constitutional harms can be remedied through tort law. This should not be surprising, for tort and constitutional law have evolved from different sources and are aimed at different ends. Pollard's constitutional claims cannot be shoehorned into tort law and the Ninth Circuit was thus correct to hold that his suit may proceed as alleged.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

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REPLY BRIEF

No. 10-1104

IN THE

Supreme Court of the United States

MARGARET MINNECI; JONATHAN E. AKANNO; ROBERT SPACK; BOB D. STIEFER; AND BECKY MANESS,

Petitioners,

v.

RICHARD LEE POLLARD *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

INTRODUCTION

This is a clear case for certiorari. Respondent ("Pollard") does not and cannot dispute that there is an unequivocal, direct circuit split that extends to two aspects of the question presented, and that the question is both important and recurring. Instead, he argues primarily that the Ninth Circuit was right and the other circuits were wrong. He is mistaken, but the merits are for this Court to decide after plenary briefing and argument. That there may be two sides to this important question is a reason to grant certiorari, not deny it.

Pollard also argues that this Court cannot decide this pure question of law without further, unspecified factual development and should instead wait for another case that may never come. The time to resolve the confusion in the law is now, and this case presents an ideal vehicle for doing that. The Ninth Circuit, like the Fourth and Eleventh circuits before it, was able to decide this quintessentially legal issue at the dismissal stage, just as this Court has done in almost every *Bivens* case it has decided. The Court should do the same here.

I. THERE IS A DIRECT CIRCUIT SPLIT.

Pollard does not dispute that there is a direct conflict among the circuits. *See* Opp. 6, 8. Nor does he deny the issue is important. And despite Pollard's attempt to confuse the issue, *cf. id.* at 4-7, the conflict involves two aspects of a single question—whether the Court should imply a new *Bivens* remedy against employees of private prison contractors—rather than two different questions.

Courts may not imply a *Bivens* remedy if there are "special factors counseling hesitation before authorizing a new kind of federal litigation." *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007). In *Holly* v. *Scott*, 434 F.3d 287 (4th Cir. 2006), the Fourth Circuit found two such factors: the defendants' status as private employees rather than government officials, and the existence of adequate (and arguably superior) state law remedies. *Id.* at 290 ("This case presents two 'special factors counseling hesitation,' each of which independently precludes the extension of *Bivens*."). Judge Motz disagreed with the reliance on the first factor, but agreed that the second warranted dismissal of the *Bivens* claim. *Id.* at 297-303. In *Alba* v. *Montford*, 517 F.3d 1249 (11th Cir.

2008), the Eleventh Circuit agreed with that result without evaluating the first factor. In this case, an extremely divided Ninth Circuit held that neither factor precluded a *Bivens* remedy. In *Peoples* v. *CCA Det. Ctrs.*, 449 F.3d 1097 (10th Cir. 2006), the *en banc* Tenth Circuit deadlocked on the entire question. And in *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 65 (2001), this Court expressly left the question unresolved.

There is thus widespread confusion in the law that warrants this Court's review. As set forth in the petition, both factors, viewed either together or independently, preclude a *Bivens* remedy. The availability of tort remedies itself means that no *Bivens* remedy should be implied. *See* Pet. 16-20. And the defendants' status as employees of a private prison contractor rather than the government is an additional factor supporting the same conclusion. *Id.* at 20-26. The Court should grant certiorari to decide that important question over which the lower courts are irreconcilably divided.

II. THERE IS NO NEED TO AWAIT FURTHER PROCEEDINGS OR CASES TO RESOLVE THE QUESTION PRESENTED.

1. The question for this Court is the same one decided by the Ninth Circuit: whether the properly-pleaded factual allegations in Pollard's complaint, even if taken as true, state a valid *Bivens* claim as a matter of law. Just as the Ninth Circuit did not need further proceedings or factual development to decide that question, this Court does not either.

Pollard implicitly assumes that the existence of a *Bivens* cause of action cannot be decided at the dismissal stage. But that is decidedly untrue. Just

like the Ninth Circuit, the Fourth and Eleventh circuits decided the identical question at the same stage. *See Holly*, 434 F.3d at 288; *Alba*, 517 F.3d at 1251; *see also Peoples* v. *CCA Det. Ctrs.*, 422 F.3d 1090, 1093 (10th Cir. 2005). This Court, as well, has decided almost all of its *Bivens* cases—including *Bivens* itself—on review of decisions granting or denying motions to dismiss.[1]

Just as in all those cases, there is no need for further proceedings here because the relevant facts are the copious allegations in Pollard's 25-page amended complaint, which are taken as true for purposes of this appeal.[2] If Pollard now believes—unlike the dissenters below, Pet. App. 5a, 56-57a—that he had no adequate state law remedy for his alleged grievances, he may argue that point in his brief on the merits. For example, if he thinks his claims, as pleaded, fail under state law but not in a *Bivens* action, *cf.* Opp. 9, he can try to explain why. But no further proceedings are needed to make that point. Indeed, contradicting his own assertion that the issue cannot be decided now, Pollard argues elsewhere in his opposition that he lacks adequate alternative remedies as a matter of law. *Id.* at 19-21.

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[1] *See Malesko*, 534 U.S. at 65; *Schweiker* v. *Chilicky*, 487 U.S. 412, 419 (1988); *United States* v. *Stanley*, 483 U.S. 669, 673 (1987); *Chappell* v. *Wallace*, 462 U.S. 296, 298 (1983); *Green* v. *Carlson*, 581 F.2d 669, 670 (7th Cir. 1978), *aff'd sub nom. Carlson* v. *Green*, 446 U.S. 14 (1980); *Davis* v. *Passman*, 442 U.S. 228, 232 (1979); *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 390 (1971).

[2] The facts, however, are *not* those set forth in the citation-free "Facts" section of Pollard's brief in opposition. *See* Opp. 1-3. Many of those purported facts, as Pollard now characterizes them, are not set forth in the amended complaint.

2. Given the obstacles to appellate review in other cases, *see* Pet. 29-32, if the Court passes up this ideal opportunity to resolve the conflict it may be a long time before another one arises. Pollard says the Court "should wait for a case where state law tort claims have been litigated on the facts." Opp. 10. But there is no reason for such delay, and it is doubtful such a case, if it ever arose, would present a suitable vehicle for resolving the *Bivens* issue.

Pollard points to another case still in its infancy, *Phillip* v. *GEO Group*, No. 5:09-CT-3115-FL, 2011 WL 1297606 (E.D.N.C. Mar. 31, 2011), but that case only shows the problems with further delay. There, the *Bivens* claims were dismissed under the Fourth Circuit's *Holly* decision, but state law claims were allowed to proceed. Because the Fourth Circuit has already held there is no *Bivens* claim, only the plaintiff could seek certiorari on that issue and likely only if he loses on appeal of the other claims. Thus, the only way the issue effectively could reach this Court in that case is if (1) the case is not settled; (2) a final judgment is appealed and the plaintiff loses on grounds not also applicable to the *Bivens* claims; and (3) the plaintiff elects to seek certiorari on the *Bivens* issue even though he lost on the state law claims.

That particular constellation of circumstances is unlikely ever to arise, and certainly not soon, and the presence of the additional issues would complicate review. Moreover, as shown in the petition, there are similar impediments to review in other cases—most notably, the prospect of *in terrorem* settlements. In the meantime, the confusion in the circuits will only persist. By contrast, the issue is squarely presented in this case and ripe for decision. The Court should decide it.

III. POLLARD'S MERITS ARGUMENTS ARE NO REASON TO DENY CERTIORARI.

Most of Pollard's opposition is devoted to arguing that the Ninth Circuit was right on the merits and the other circuits were wrong. That is no reason to deny certiorari where, as here, the circuits are hopelessly divided on a concededly important question. Both sides can present all their arguments at the merits stage and the Court will then decide the question after plenary briefing and argument. But Pollard's merits arguments are nevertheless mistaken; indeed, the Ninth Circuit's holding conflicts with this Court's precedents.

1. Pollard argues that his claim is "in all material respects identical to that approved in *Carlson*." Opp. 13. It is not. In *Carlson*, as in the other two cases where the Court has implied a *Bivens* remedy (including *Bivens* itself) the plaintiff had no adequate alternative remedy. *See* Pet. 16-19. The claims in *Carlson* were subject to the Federal Tort Claims Act ("FTCA"), which pre-empted all tort claims against the individual federal officers, and the Court viewed the sole FTCA remedy against the United States as inadequate. *Carlson*, 446 U.S. at 21. Here, by contrast, Congress specifically *exempted* employees of private contractors from the FTCA, so the alternative individual tort remedy remains applicable. *See* Pet. 24-25.

Pollard argues that the existence of alternative remedies is irrelevant because he is not seeking an "extension" of *Bivens*, Opp. 16-17, but that argument just begs the question. Because the Court, including in *Carlson*, has never implied a *Bivens* remedy where adequate alternative remedies are available, this case *would* be an extension of the doctrine. The

Court has explained that "[s]ince *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68. That is exactly what Pollard seeks to do here: "extend *Bivens* liability" to both a "new context" and a "new category of defendants." He cannot do that without independently justifying the extension.[3]

Pollard next argues that "only *federal* alternative remedies [are] relevant" in assessing whether a *Bivens* remedy should be implied. Opp. 15 (emphasis in original). But as Judge Restani explained below, "an alternative remedy need not be a federal remedy." Pet. App. 59a. Indeed, this Court "in *Bivens* itself expressed concern that Bivens could not recover damages against the federal narcotics agents under state tort law." *Alba*, 517 F.3d at 1254. *See Bivens*, 403 U.S. at 394. Similarly, in *Wilkie*, the Court noted that the plaintiff "had a civil remedy in damages for trespass" and characterized *Malesko* as a case "considering [the] availability of state tort remedies in refusing to recognize a *Bivens* remedy." 551 U.S. at 551 (citing *Malesko*, 534 U.S. at 72-73).

Where the plaintiff has "any alternative remedy," *Malesko*, 534 U.S. at 70, there is no need for courts to exercise their extraordinary power to imply a judge-made remedy that Congress has not seen fit to provide. Petitioners agree with Pollard that "[r]egulation of federal officers is the prerogative of the federal government." Opp. 19. But where

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[3] Pollard's contention that *Malesko* decided the issue in his favor, Opp. 13-14, is easily refuted by the fact that *Malesko* expressly left the question unresolved. *Malesko*, 534 U.S. at 65 ("[T]he parties agree that the question whether a *Bivens* action might lie against a private individual is not presented here.").

Pollard would have that regulation come from the courts making up their own causes of action and re-defining who is a federal officer, petitioners believe it should come from Congress. *See Holly*, 434 F.3d at 290; DRI Amicus Br. 5-8.

Pollard also argues that state tort remedies were not adequate to redress his grievances, Opp. 19-21, but he does not support that assertion with any authority. The question is not whether Pollard would lose on state law claims. In petitioners' view, he would lose on state law claims just as surely as he would lose on his constitutional claims. The question is whether Pollard's factual allegations, as pleaded, would fail to state a claim as a matter of law under state law but nevertheless succeed under the Eighth Amendment. Pollard has made no such showing.

As the dissenters noted below, "Pollard's remedy under state law against both jailers and doctors is actually superior to any presumed action he would have under *Bivens*." Pet. App. 10a (Bea, J., dissenting), 67a (Restani, J., dissenting). *See also* Pet. App. 79a & n.1. That is because "the heightened 'deliberate indifference' standard of Eighth Amendment liability would make it considerably more difficult for [Pollard] to prevail than on a theory of ordinary negligence." *Malesko*, 534 U.S. at 74 (citing and quoting *Farmer* v. *Brennan*, 511 U.S. 825, 835 (1994) ("[D]eliberate indifference describes a state of mind more blameworthy than negligence.")).

Pollard does not, and cannot, show that his state law remedies are weaker than what the Eighth Amendment would provide. California law recognizes that the relationship between prison personnel and inmates is "protective by nature," and "the epitome of a special relationship, imposing a

duty of care on a jailer owed to a prisoner." *Giraldo* v. *Cal. Dep't of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371, 386 (Cal. Ct. App. 2008). In California, as elsewhere, "[j]ailers owe prisoners a duty of care to protect them from foreseeable harm." *Id.* at 387. *See* Pet. App. 65a (Restani, J., dissenting).

Pollard thus would be far more likely to succeed in obtaining a remedy under state law than under the Eighth Amendment. Whereas California law broadly imposes on jailers an affirmative duty to protect prisoners from foreseeable harm, the Eighth Amendment would require Pollard to prove that the defendant "knows of and disregards an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. Under California law, health care providers are liable for "negligent diagnosis or treatment or the negligent failure to diagnose or treat." Cal. Civ. Code § 1714.8. *See* App. 67a (Restani, J., dissenting), 79a n.1. But under the Eighth Amendment, Pollard would have to show "deliberate indifference to serious medical needs of prisoners" that constitutes "unnecessary and wanton infliction of pain." *Estelle* v. *Gamble*, 429 U.S. 97, 105 (1976).

Pollard has not shown that any of his claims would be actionable under the narrow *scienter*-based Eighth Amendment standard but nevertheless barred by the broad, protective standard of California law. Indeed, he does not even cite to the factual allegations in his own complaint, much less any authority holding those allegations actionable under the Eighth Amendment but not California law. But in any event, Pollard will have ample opportunity to try to make that showing at the merits stage.

2. As shown in the petition, Pet. 20-26, petitioners' status as private employees rather than

federal officials is yet another "special factor[]" counseling against implying a *Bivens* remedy. *Wilkie*, 551 U.S. at 550.

In response, Pollard relies on *West* v. *Atkins*, 487 U.S. 42 (1988), but that case did not address the propriety of a *Bivens* remedy because it involved a state, not federal, facility. *West* was decided under the specific language of 42 U.S.C. § 1983, in which Congress, for specific policy reasons, established a damages remedy for constitutional claims and extended it to anyone acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia."[4]

Far from doing the same for anyone acting "under color of federal law," Congress has employed that language sparingly and, in the prison context, has declined to extend causes of action to such people. *See* Pet. 25. The *Bivens* remedy is a narrow one crafted for claims against "federal officers." *Malesko*, 534 U.S. at 70. Because of that status, federal officers have recognized immunities—notably, the qualified immunity defense—that private contractor employees lack. Pet. 22. Thus, as Pollard does not dispute, implying a *Bivens* remedy here would subject these private employees to greater risk of liability than is faced by their governmental counterparts. *Id.* at 23. Whether an asymmetrical

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[4] Moreover, the defendant in *West* was "a physician employed by North Carolina," which effectively made him a state employee. 487 U.S. at 54. Here, by contrast, the defendants were employed by a private company and had no contractual or employment relationship with the federal government. That further distinguishes this case from *West*, "where the state itself was directly responsible for managing the prison." *Holly*, 434 F.3d at 294.

private damages remedy should be authorized against such individuals for discharging their duties in good faith is a policy-laden "question for Congress, not [the courts], to decide." *Malesko*, 534 U.S. at 72.

This case does not require the Court to grapple with broad concepts of "state action" applicable in other legal contexts. *Cf.* Opp. 14. For example, the case does not involve the propriety of injunctive relief. *See Malesko*, 534 U.S. at 74 ("[U]nlike the *Bivens* remedy, which we have never considered a proper vehicle for altering an entity's policy, injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally"). The question is whether the Ninth Circuit erred in implying, by judicial fiat, a *Bivens* damages remedy against a "new category of defendants" never before subjected to one. *Id.* at 68. The Court should grant certiorari, reverse that judgment, and leave that policy question to Congress.

CONCLUSION

For the foregoing reasons and those in the petition, the petition should be granted and the judgment below reversed.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE* DRI[1]

DRI is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and their clients, and to the civil justice system. Consequently, DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and – where national issues are involved – consistent.

To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues of import to its members, their clients, and to the judicial system. Recently, DRI has filed *amicus* briefs in this Court addressing the inconsistent application of law or judicial intrusion into legislative or regulatory authority. *See, e.g.*, *Matrixx Initiatives Inc. v. Siracusano*, 131 S. Ct. 1309 (2011); *Stolt-Nielsen S.A.*

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* certifies that counsel of record for both petitioner and respondents have consented to this filing in letters on file with the Clerk's office. The parties were notified of the intention to file ten days prior to the due date of this brief.

v. Animalfeeds Int'l Corp., 130 S. Ct. 1758 (2010); *see also Greenwood v. CompuCredit Corp.*, 615 F.3d 1204 (9th Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3442 (U.S. Jan. 24, 2011) (No. 10-948).

In the proceedings below, a divided panel authorized a private *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) action for damages against private prison employees for alleged constitutional violations. In so doing, the majority broke away from the decisions of two other Circuits, both of which declined to recognize *Bivens* actions under largely the same circumstances, as well as controlling Supreme Court authority. Although the majority's decision created a seismic rift in current *Bivens* jurisprudence, the Ninth Circuit nevertheless denied rehearing *en banc*, with several judges dissenting in a sharply worded opinion.

The petition for writ of certiorari does an exemplary job of explaining why the majority's decision requires this Court's review and DRI will not repeat those reasons here. Instead, DRI submits this *amicus* brief to amplify the legal and practical consequences of the panel majority's decision, which favor granting certiorari as well.

As an initial matter, because creation of private causes of action is better suited to the legislative process, this Court for the last 30 years has refused to extend *Bivens* actions beyond three limited circumstances – none of which are present in this case. But the lower court's decision takes *Bivens* into uncharted territory by exposing private employees to

an unprecedented form of personal liability. The ramifications of extending *Bivens* in this manner involve precisely the type of complex and competing policy and practical issues that are best suited for the legislative process. Yet, while Congress has adopted multiple statutes governing private prisons, none of those statutes state or imply any intent to create avenues for relief beyond what the statutes provide. By creating a cause of action in the absence of any indication from Congress that one should exist, the Court of Appeals majority has improperly substituted its own judgment for Congress's and thus overstepped its bounds.

Moreover, as two other Circuits have recognized, creating a *Bivens* action in these circumstances will not accomplish the majority's stated purpose of achieving uniformity in the law. On the contrary, not only does the ruling depart from this Court's established jurisprudence, but it also imposes a second liability regime on top of the fifty states' tort laws. As a result, rather than promoting uniformity, the Court of Appeals majority has opened the door to parallel liability under a whole new set of rules. Nothing in the *Bivens* jurisprudence warrants that extraordinary result.

Finally, DRI is concerned that the decision will reverberate beyond the private prison setting. Because the Court of Appeals majority provides no measurable limits on *Bivens*, other private employees who work for companies that contract with the government – and DRI's membership represents many of

these companies – face an inchoate risk of personal liability. Because of the breadth of the government's contracting operations, the number of private employees that face potential liability is immense and the potential for an increase in *Bivens* lawsuits is substantial. Before the decision takes root, and unleashes these consequences on private employees and the judicial system, this Court should grant review to determine whether there are solid legal grounds for doing so.

REASONS FOR GRANTING THE PETITION

Creating "a private right of action is . . . better left to legislative judgment in the great majority of cases." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). The unifying thread among the only three decisions in which this Court has permitted the unlegislated *Bivens* theory was that the plaintiff had no sufficient remedy to redress his or her grievance. *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. at 389 (federal agents who, under the color of federal authority, commit Fourth Amendment violations could be liable for civil damages; plaintiff could not sue federal officer under Section 1983); *Davis v. Passman*, 442 U.S. 228, 245 (1979) (employee of Congressman could allege claims under the Fifth Amendment's equal protection clause for gender discrimination; plaintiff had no remedies under federal anti-discrimination statutes or state law); *Carlson v. Green*, 446 U.S. 14, 20, 25 (1980) (prisoner

could sue public prison official; although Federal Tort Claims Act provided plaintiff with an alternative remedy against the United States, it provided no remedy against the individual who committed the constitutional violation).

As petitioners note, this Court uniformly has refused to expand *Bivens* beyond the above trilogy in many decisions over the last 30 years. This jurisprudence is a byproduct of the limited role of the judicial branch – and, by contrast, the primacy of Congress – in determining whether substantive legal liability should be created in the public interest. *See Schweiker v. Chilicky*, 487 U.S. 412, 426-27 (1988) ("[W]e declined in *Bush* '"to create a new substantive legal liability . . . " because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it.'" (internal quotations and citation omitted). As the Fourth Circuit observed in rejecting *Bivens* actions against private prison employees:

> Congress possesses a variety of structural advantages that render it better suited for remedial determinations in cases such as this. Unconstrained by the factual circumstances in a particular case or controversy, Congress has a greater ability to evaluate the broader ramifications of a remedial scheme by holding hearings and soliciting the views of all interested parties. [citation] And by debating policies and passing statutes rather than deciding individual cases, Congress has increased latitude to implement potential

> safeguards – e.g., procedural protections or limits on liability – that may not be at issue in a particular dispute.

Holly v. Scott, 434 F.3d 287, 290 (4th Cir. 2006).

Here, as the Fourth Circuit also observed, "there are a variety of statutes authorizing the housing of federal inmates in privately operated facilities." *Holly*, 434 F.3d at 290 (citing 18 U.S.C. § 4013(b)). "Congress passed these statutes in the belief that private management would in some circumstances have comparative advantages in terms of cost, efficiency, and quality of service." *Id.* However, nothing in these statutes states or implies Congressional intent to create a right of action against private prison employees for constitutional violations. *Cf. Carlson*, 446 U.S. at 20 (*Bivens* action permissible where Federal Tort Claims Act explicitly stated that the statute ran parallel to *Bivens* actions). On the contrary, to create a *Bivens* action in addition to existing statutory "avenues of inmate relief might well frustrate a clearly expressed congressional policy." *Holly*, 434 F.3d at 290.

The Court of Appeals majority did not heed this statutory scheme or the absence of any express or implied intent by Congress to provide a remedy for constitutional violations by private prison employees. Instead, the majority simply substituted its own judgment. This kind of judicial legislating is forbidden. *See U.S. v. Nat'l Treasury Employees Union*, 513 U.S. 454, 479 (1995) ("Our obligation to avoid judicial

legislation also persuades us to reject the Government's second suggestion – that we modify the remedy by crafting a nexus requirement for the honoraria ban."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 394 n.100 (1982) ("It is just as much 'judicial legislation' for a court to withdraw a remedy which Congress expected to be continued as to improvise one that Congress never had in mind." (citation omitted)).

There is no practical reason to depart from these longstanding prohibitions against judicial legislation, either. Again, the Court has extended *Bivens* only twice – "to provide an otherwise nonexistent cause of action . . . [and] to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct." *See Corr. Svcs. Corp. v. Malesko*, 534 U.S. 61-62, 70 (2001) (emphasis omitted). But here, the individual tort regimes of the fifty states already provide prisoners with adequate means of redressing their grievances through damages. In light of these available alternative remedial schemes, creating a *Bivens* action through judicial legislation is an unnecessary and unwarranted exercise.

The creation of a *Bivens* action also is troubling because it constitutes a profound leap of uncertain implications. Statutes that impose personal liability on persons who commit civil rights violations under the color of law were developed with the understanding that public employees assume certain official duties when accepting public employment, and thus

are entitled to various privileges, immunities, and indemnity rights by virtue of their public employment. In the few instances in which it has authorized *Bivens* actions, the Supreme Court undoubtedly assumed that similar duties, privileges, immunities, and indemnity rights would apply to the federal officials subject to suit because those officials likewise were public employees. But the extension of *Bivens* to private employees in this case takes a doctrine developed exclusively to apply to public officials and injects it into an arena – private employment – where the rules are different. It is impossible to foresee all of the implications of extending *Bivens* into this new arena, and that is ample reason for the courts to exercise restraint and leave the issue for the legislative process, where those ramifications can be more fully explored.

Apart from overstepping its bounds, the Court of Appeals majority has done grave harm to its own stated intent of providing uniform liability for these kinds of claims. The majority has dropped a *Bivens*-based liability scheme right on top of the fifty states' tort law regimes. In the process, the panel has created a circuit split regarding whether a *Bivens* action may be maintained in these circumstances at all. The result is that some private prison employees may face tort liability under a patchwork of different state laws, as well as *Bivens* claims. Others may face only *Bivens* claims. Still others may face a patchwork of state tort liability and no *Bivens* claims at all. In all cases, private prison employees will not have the

benefit of a qualified immunity defense that their public employee counterparts enjoy. That is hardly a uniform picture of liability.

Finally, the Court of Appeals' decision will likely reach beyond private prison employees, resulting in a flood of *Bivens* actions. The majority has blurred the *Bivens* line in a way that creates uncertainty not just for private prison employees, but for all employees at any of the numerous private companies that contract with the government. All of these employees now face an inchoate risk that the decision may spur actions against them.

The number of private employees performing what typically are considered "government functions" – and who are thus potentially subject to *Bivens* actions under the Court of Appeals' reasoning – has only increased over the past twenty years. *See* Laura A. Dickinson, *Public Law Values In A Privatized World*, 31 YALE J. INTL. L. 383, 383-84 (2006). The growth in privatization has touched not only the prison management sector, but also sectors such as health care, education, welfare and public benefit administration, foreign affairs, and security services. *See id.*; *see also* Richard Frankel, *Regulating Privatized Government Through § 1983*, 76 U. CHI. L. REV. 1449, 1451-52 (2009); Laura A. Dickinson, *Government For Hire: Privatizing Foreign Affairs And The Problem Of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 137-38 (2005). Plus, "[w]ith billions of dollars in federal aid from the recently enacted economic stimulus package going to

state and local governments, privatization opportunities should only increase." Frankel, *supra*, at 1452.

At the same time, as petitioners point out, our courts have been inundated with approximately 19,000 *Bivens* actions in the last decade alone. On its face, this number is astonishing considering that the Court has recognized *Bivens* actions in only three limited circumstances. However, because the majority's decision would potentially expose all employees of private government contractors to *Bivens* liability – at a time when privatization of government functions is trending rapidly upwards – the number of *Bivens* actions filed in the next decade could skyrocket well above 19,000.[2] Before burdening our courts any further, as the Court of Appeals majority would envision, this Court should grant review to ensure there are good legal grounds for doing so.

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[2] In the brief period since the Ninth Circuit denied rehearing *en banc* in this case, the decision already has been cited in actions that do not involve private prison employee-defendants. *See, e.g.*, *Reiner v. Mental Health Kokua*, No. 10-00340, 2011 WL 322535, at *6-8 (D. Haw. Jan. 31, 2011) (dismissing Fifth and Fourteenth Amendment claims against non-profit mental health facility operator and its employees because they were not state actors under *Pollard*); *Martinez v. Mercy Hosp. of Bakersfield*, No. 1:09-cv-01994, 2011 WL 444861, at *1 n.1 and *2 (E.D. Cal. Feb. 8, 2011) (dismissing Eighth Amendment claim against private hospital and its medical staff, "assuming but not deciding" that defendants could be state actors under *Pollard*).

CONCLUSION

The Court of Appeals' decision creates a direct circuit split, is a leap from current precedent, constitutes impermissible judicial legislation, and will lead to countless *Bivens* actions in the future. By any measure, Supreme Court review of this decision is warranted and respectfully urged.

Dated: April 11, 2011.

Respectfully submitted,

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JOINT APPENDIX

RECORD AND BRIEFS

JUN 2 2011

No. 10-1104

IN THE

Supreme Court of the United States

MARGARET MINNECI; JONATHAN E. AKANNO; ROBERT SPACK; BOB D. STIEFER; AND BECKY MANESS,

Petitioners,

v.

RICHARD LEE POLLARD *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED MARCH 9, 2011
CERTIORARI GRANTED MAY 16, 2011

Library of Congress
Law Library

Brian Wolfman
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Appendix D: First Amended Complaint in the United States District Court for the the Eastern District of California, *Pollard* v. *Wackenhut Correctional Corp.* et al., No. 1:01-CV-06078-OWW-WMW, filed April 18, 2002 26

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[1] Typographical errors in the Joint Appendix reproduce the errors in the original documents.

APPENDIX A

General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 07-16112 **Nature of Suit:** 3550 Prisoner-Civil Rights Pollard v. Wackenhut **Appeal From:** U.S. District Court for Eastern California, Fresno **Fee Status:** IFP * * *	**Docketed:** 06/21/2007 **Termed:** 06/07/2010

Originating Court Information:

District: 0972-1 : CV-01-06078-OWW/WMW

Trial Judge: Oliver W. Wanger, Senior District Judge

Date Filed: 08/21/2001

Date Order/Judgment: 06/07/2007	**Date NOA Filed:** 06/18/2007

* * *

[DATE]	[NO.][2]	[DOCKET TEXT]
06/21/2007	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): No. setting schedule as follows: appellant's opening brief is due 7/31/07; appellees' brief is due 8/30/07; appellants' reply brief is due 9/13/07. [07-16112] (RT)
06/21/2007	5	Filed John F. Preis's motion for admission pro hac vice. (MOATT); served on 6/19/07 (SW)
		* * *
07/27/2007	7	Filed original and 15 copies Appellant Richard Lee Pollard's opening brief (Informal: no) 45 pages; 5 excerpts of record (1 Exc.vol);served on 7/26/07 (minor defcy: EOR must be bound on the left side) Notified counsel. minor brief deficiency response due 8/10/07; [07-16112] (SW)
07/27/2007	8	Filed Appellant Richard Lee Pollard's motion for oral argument. (PROMO) [07-16112] served on 7/26/07 [6243396] [07-

[2] Where notations of the number of pages and file size of certain documents appear next to the docket number in the court of appeals' docket, those notations have been omitted.

		16112] (SW)
		* * *
08/03/2007	10	Case rejected from Circuit Mediation Program. (SB)
09/10/2007	11	Filed order (Appellate Commissioner /MOATT) John F. Preis, Esq. to be admitted pro hac vice is granted. the mtn for oral argument is referred to the panel assigned to hear the merits of this appeal. The ans br is due 10/9/007; opt rpy br due 14 days after... [07-16112] (MF)
01/20/2009	13	Sent Appellee Wackenhut 31c letter for failure to file answering brief. Response is due 14 days from the date of this notice. (EU)
		* * *
02/02/2009	17	Filed (ECF) Appellee Wackenhut Motion for miscellaneous relief [Appellee's Motion for Relief from Filing an Answering Brief; Declaration of Andje Morovich Medina, Esq.]. Date of service: 02/02/2009. [6793168] (AMM)
02/12/2009	18	Filed (ECF) Appellant Richard Lee Pollard response opposing motion (Motion (ECF Filing) , motion for miscellaneous relief

		(to be used only if no other relief applies)). Date of service: 02/12/2009. [6807577] (JFP)
04/27/2009	19	Filed order (Appellate Commissioner): Appellee's motion to dismiss the appeal for lack of jurisdiction is denied. Appellee's motion for an extension of time to file the answering brief is granted. The answering brief is now due May 27, 2009; and the optional reply brief is due within 14 days after service of the answering brief. Appellee's alternative motion to file an amicus brief is denied. (MOATT) (AF)
05/27/2009	20	Submitted (ECF) Answering brief for review. Submitted by Appellee Wackenhut. Date of service: 05/27/2009. [6933687] (AMM)
05/27/2009		Filed clerk order: Answering Brief [20] filed by Wackenhut. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a Red cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. (WP)

05/27/2009	21	Filed Appellant Richard Lee Pollard excerpts of record in 1 volume. Served on 05/27/2009 (WP)
05/28/2009	22	Received 10 paper copies of Answering brief [20] filed by Wackenhut in 07-16112. One copy to Case Files, the remainder to Records. (SD)
06/10/2009	23	Submitted (ECF) Reply brief for review. Submitted by Appellant Richard Lee Pollard. Date of service: 06/10/2009. [6951920] (JFP)
06/11/2009		Filed clerk order: Reply Brief [23] filed by Richard Lee Pollard. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a Grey cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. (WP)
06/12/2009	24	Received 10 paper copies of Reply brief [23] filed by Richard Lee Pollard in 07-16112. One copy to Case Files, the remainder to Records. (SD)

* * *

07/16/2009	27	CALENDARED: 10/07/2009 9:00 AM San Francisco, CA Courtroom 2 [6994954] [05-74358, 07-16252, 08-17047, 07-16112, 08-10129, 08-15849] (AW)
08/27/2009	28	Notice of Oral Argument on OCTOBER 7, 2009 Calendar. Please return ACKNOWLEDGEMENT OF HEARING NOTICE form to: SAN FRANCISCO Office. Please open attached documents to view details about your case. [7042257] (AM)
		* * *
10/07/2009	31	ARGUED AND SUBMITTED TO PROCTER R. HUG, RICHARD A. PAEZ and JANE A. RESTANI. [7087940] (SC)
03/15/2010	32	Entered appearance of Appellees Margaret Minneci, Jonathan E. Akanno, Robert Spack, Bob D. Steifer and Becky Maness (per request from Judge). [7266483] (ASW)
		* * *
05/03/2010	35	Filed (ECF) Appellant Richard Lee Pollard citation of supplemental authorities. Date of service: 05/03/2010. [7322103]

		(JFP)
		* * *
06/07/2010	37	FILED OPINION (PROCTER R. HUG, RICHARD A. PAEZ and JANE A. RESTANI) AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Judge: PRH , Judge: RAP Authoring, Judge: JAR Concurring & Dissenting. FILED AND ENTERED JUDGMENT. [7361724] (PH)
		* * *
06/16/2010	40	Filed order (PROCTER R. HUG, RICHARD A. PAEZ and JANE A. RESTANI): Appellant shall recover his costs on appeal. [7374849] (AF)
		* * *
06/17/2010	42	Filed (ECF) Appellant Richard Lee Pollard bill of costs (Form 10) in the amount of 92.41 USD. Date of service: 06/17/2010 [7375705] (JFP)
		* * *
06/17/2010	44	Filed (ECF) Appellees Jonathan E. Akanno, Becky Maness, Margaret Minneci, Robert

		Spack, Bob D. Steifer and Wackenhut Stipulated Motion to extend time to file petition for rehearing until 07/12/2010 at 11:59 pm. Date of service: 06/17/2010. [7376388] (DJW)
		* * *
06/21/2010	46	Filed order (RICHARD A. PAEZ): Appellees' unopposed motion for an extension of time to file a petition for panel rehearing and rehearing en banc is GRANTED. Any petition for rehearing or rehearing en banc shall be filed on or before July 12, 2010. [7379202] (AF)
07/12/2010	47	Filed (ECF) Appellees Jonathan E. Akanno, Becky Maness, Margaret Minneci, Robert Spack, Bob D. Steifer and Wackenhut petition for panel rehearing and petition for rehearing en banc (from 06/07/2010 opinion). Date of service: 07/12/2010. [7402059] (SJR)
07/13/2010	48	Filed order (PROCTER R. HUG, RICHARD A. PAEZ and JANE A. RESTANI): Appellant is directed to file a response, not to exceed 15 pages or 4200 words, to Appellees' petition for

		rehearing and for rehearing en banc filed with this court on July 12, 2010. The response shall be filed with the Clerk of the Court within 21 days from the date of this order. [7403188] (AF)
07/22/2010	49	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by DRI. Date of service: 07/22/2010. [7414361] (DJd)
07/22/2010	50	Entered appearance of Amicus Curiae - Pending (DRI). [7414410] (RR)
08/02/2010	51	Filed (ECF) Appellant Richard Lee Pollard response to ,for panel and en banc rehearing (statistical entry),for panel and en banc rehearing. Date of service: 08/02/2010. [7426051]. (JFP)
08/09/2010	52	Filed (ECF) Appellees Jonathan E. Akanno, Becky Maness, Margaret Minneci, Robert Spack, Bob D. Steifer and Wackenhut Motion to file supplemental brief for petition for rehearing. Date of service: 08/09/2010. [7433496] (SJR)
08/09/2010	53	Filed (ECF) Appellees Jonathan E. Akanno, Becky Maness,

		Margaret Minneci, Robert Spack, Bob D. Steifer and Wackenhut reply to ,for panel and en banc rehearing (statistical entry),for panel and en banc rehearing, ,motion to file supplemental briefing for petition for rehearing. Date of service: 08/09/2010. [7433498]. (SJR)
08/12/2010	54	Filed order (PROCTER R. HUG, RICHARD A. PAEZ and JANE A. RESTANI): Appellees' motion for leave to file a reply to appellant's opposition to panel rehearing and rehearing en banc is DENIED. [7437476] (AF)
12/10/2010	55	Filed order and amended opinion (PROCTER R. HUG, RICHARD A. PAEZ and JANE A. RESTANI). (Judge Bea dissents from the denial of rehearing en banc) The majority opinion is amended as follows:(see order for full text). The dissenting opinion is amended as follows:(see order for full text). The amended opinion and amended dissent are filed concurrently with this order. With those amendments, Judges Hug and Paez voted to deny the petition for panel rehearing. Judge Restani voted

		to grant the petition for panel rehearing. The petition for panel rehearing is DENIED. Judge Paez voted to deny the petition for rehearing en banc and Judge Hug so recommended. Judge Restani recommended that the petition for rehearing en banc be granted. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. FED. R. APP. P. 35. The petition for rehearing en banc is DENIED. [7575436]--[Edited 12/10/2010 by RP] [7575436] (RP)
12/15/2010	56	Filed (ECF) Appellees Jonathan E. Akanno, Becky Maness, Margaret Minneci, Robert Spack, Bob D. Steifer and Wackenhut Joint Motion to stay the mandate. Date of service: 12/15/2010. [7582319] (DJW)
12/17/2010	57	Filed order (PROCTER R. HUG, RICHARD A. PAEZ and JANE A. RESTANI): The parties' joint motion to stay the mandate for 90 days pending a timely

		petition for writ of certiorari pursuant to Fed. R. App. P. 41(d)(2) and Ninth Circ. Rule 41-1 is GRANTED. [7584144] (AF) * * *
03/10/2011	60	Filed (ECF) Appellees Jonathan E. Akanno, Becky Maness, Margaret Minneci, Robert Spack, Bob D. Steifer and Wackenhut Correspondence: Notice of filing of petition for certiorari pursuant to Fed. R. App. P. 41(d)(2)(B). Date of service: 03/10/2011 [7676175] (JSF)
03/11/2011	61	Received notice from the Supreme Court: petition for certiorari filed on 03/09/2011 and placed on the docket 03/10/11. Supreme Court Number 10-1104. [7677849] (RR)
05/16/2011	62	Received notice from the Supreme Court. Petition for certiorari GRANTED on 05/16/2011. Supreme Court Number 10-1104. [7753519] (RR)

APPENDIX B

U.S. District Court
Eastern District of California - Live System

(PC) Pollard v. Wackenhut
Assigned to: Judge Oliver W. Wanger
Referred to: Magistrate Judge Gary S. Austin
Demand: $0
Case in other court: Ninth Circuit, 07-16112
Cause: 28:1331 Federal Question: Bivens Act

Date Filed: 08/21/2001
Date Terminated: 06/07/2007
Jury Demand: Plaintiff
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: U.S. Government Defendant

* * *

Date Filed	#	Docket Text
08/21/2001	1	COMPLAINT for Prisoner Civil Rights, fee status IFP requested, assigned to Judge Oliver W. Wanger referred to Magistrate Judge Hollis G. Best (old) (Entered: 08/22/2001)
09/21/2001	2	ORDER by Hollis G Best Magistrate Judge ORDERING case mgmt ddl set for 10/24/01 for pltf to submit a completed application to proceed in forma pauperis or pay the $150 filing fee for this action (cc: all counsel) (sr)

		(Entered: 09/21/2001)
10/22/2001	3	APPLICATION TO PROCEED IFP by plaintiff Richard Lee Pollard (tel) (Entered: 10/23/2001)
11/16/2001	4	ORDER by Magistrate Judge Hollis G. Best ORDERING in forma pauperis application [3-1] GRANTED filing fee of $ 150.00 required by plaintiff Richard Lee Pollard cause complaint [1-1] DISMISSED, case mgmt ddl set for 12/21/01 to file amended complaint (cc: all counsel) (rcf) (Entered: 11/19/2001) * * *
12/07/2001	7	MOTION for leave for extension of time to file amended complaint due to extraordinary circumstances by plaintiff Richard Lee Pollard (jv) (Entered: 12/10/2001)
01/16/2002	8	ORDER by Hollis G Best Magistrate Judge ORDERING motion for leave for extension of time to file amended complaint due to extraordinary circumstances by plaintiff Richard Lee Pollard [7-1] GRANTED case mgmt ddl set for 2/16/02 (cc: all counsel) (wh) (Entered: 01/16/2002)
03/07/2002	9	ORDER by Hollis G Best Magistrate Judge ORDERING probable cause complaint [1-1] DISMISSED case mgmt ddl set for 4/7/02 to file Amended Complaint (cc: all counsel) (wh)

		(Entered: 03/07/2002)
04/11/2002	10	FINDINGS AND RECOMMENDATIONS by Hollis G Best Magistrate Judge RECOMMENDING DISMISSAL of action for failure to state a claim upon which relief can be granted; Case Mgmt Ddl set for 5/5/02 to file objections (cc: all counsel) (tel) (Entered: 04/12/2002)
04/18/2002	11	FIRST AMENDED COMPLAINT by plaintiff Richard Lee Pollard (old) (Entered: 04/19/2002)
04/26/2002	12	OBJECTIONS TO FINDINGS AND RECOMMENDATIONS [10-1] by plaintiff Richard Lee Pollard (jh) (Entered: 04/29/2002) * * *
09/06/2003	14	ORDER by Chief Judge David F. Levi ORDERING casereassigned on interim basis due to death of Magistrate JudgeHollis G. Best to Magistrate Judge Lawrence J. O'Neill (cc: all counsel) (kh) (Entered: 09/06/2003)
05/02/2004	15	ORDER by Chief Judge David F. Levi ORDERING Case REFERRED to Magistrate Judge William M. Wunderlich (cc: all counsel) (kh) (Entered: 05/02/2004) * * *

09/14/2006	17	FINDINGS and RECOMMENDATIONS recommending that Action be Dismissed Objections to F&R due by 10/17/2006 signed by Judge William M. Wunderlich on 9/12/2006. (Timken, A) (Entered: 09/14/2006)
09/14/2006		SERVICE BY MAIL: 17 Findings and Recommendations served on Terry Craig, Richard Lee Pollard (Timken, A) (Entered: 09/14/2006)
10/18/2006	18	MOTION for SUMMARY JUDGMENT upon plaintiff's tort claim by Richard Lee Pollard. (Kusamura, W) (Entered: 10/21/2006)
06/05/2007		RECEIPT number 101-205288 for $180.00 for Pro Hac Vice Application Fee as to John F. Preis from John F. Preis. (Arellano, S.) (Entered: 06/06/2007)
06/05/2007	19	PRO HAC VICE APPLICATION and PROPOSED ORDER submitted by Richard Lee Pollard for attorney John F. Preis to appear Pro Hac Vice. (Lundstrom, T) (Entered: 06/07/2007)
06/07/2007	20	ORDER ADOPTING IN FULL 17 Findings and Recommendations and DISMISSING action signed by Judge Oliver W. Wanger on 6/7/07. CASE CLOSED.(Lundstrom, T) (Entered: 06/07/2007)

06/07/ 2007	21	JUDGMENT dated *6/7/07* (Lundstrom, T) (Entered: 06/07/2007)
06/07/ 2007		SERVICE BY MAIL: 21 Judgment, 20 Order Adopting Findings and Recommendations served on Richard Lee Pollard. (Lundstrom, T) (Entered: 06/07/2007)
06/08/ 2007	22	PRO HAC VICE ORDER signed by Judge Oliver W. Wanger on 06/07/07. Attorney John F. Preis - PRO HAC VICE added for Richard Lee Pollard. (Lundstrom, T) (Entered: 06/08/2007)
06/14/ 2007	23	MOTION Vacation of dismissal for limited purpose of noting plaintiffis objections to Magistrate's R & R by Richard Lee Pollard. (Preis - PRO HAC VICE, John) (Entered: 06/14/2007)
06/14/ 2007	24	NOTICE of APPEARANCE by John F. Preis - PRO HAC VICE on behalf of Richard Lee Pollard. (Preis - PRO HAC VICE, John) (Entered: 06/14/2007)
06/18/ 2007	25	NOTICE of APPEAL by Richard Lee Pollard as to 21 Judgment, 20 Order Adopting Findings and Recommendations. (Preis - PRO HAC VICE, John) (Entered: 06/18/2007)
06/18/ 2007	26	SUPPLEMENT by Richard Lee Pollard re 25 Notice of Appeal - ATY. *Proof of Service on Opposing Party* (Preis - PRO

		HAC VICE, John) (Entered: 06/18/2007)
06/19/ 2007	27	APPEAL PROCESSED to Ninth Circuit re 25 Notice of Appeal filed by Richard Lee Pollard. Filed dates for Notice of Appeal *6/18/2007*, Complaint *8/21/2001* and Appealed Order / Judgment *6/7/2007*. Court Reporter: *None*. *Fee Status: IFP Granted on 11/16/2001* ** (Attachments: # 1 Appeal Notice # 2 Certificate of Record) (Hellings, J) (Entered: 06/19/2007)
06/19/ 2007		SERVICE BY MAIL:27 Appeal Processed to USCA, served on Terry Craig, John F. Preis - PRO HAC VICE. (Hellings, J) (Entered: 06/19/2007)
06/26/ 2007	28	USCA CASE NUMBER 07-16112 for 25 Notice of Appeal - ATY filed by Richard Lee Pollard. (Esteves, C) (Entered: 06/27/2007)
06/26/ 2007	29	ORDER of USCA (TIME SCHEDULE) as to 25 Notice of Appeal - ATY filed by Richard Lee Pollard. (Esteves, C) (Entered: 06/27/2007)
09/08/ 2009	30	TRANSMITTED RECORD on APPEAL to USCA # *07-16112* re 25 Notice of Appeal. * Volumes of Files: 1. Paper Documents: 1 to 29. * (Hellings, J) (Entered: 09/08/2009)
06/07/	31	OPINION of USCA as to 25 Notice of

2010		Appeal filed by Richard Lee Pollard. (Verduzco, M) (Entered: 06/09/2010)
06/16/ 2010	32	ORDER of USCA as to 25 Notice of Appeal filed by Richard Lee Pollard; Appellant shall recover his costs on appeal. (Scrivner, E) (Entered: 06/17/2010)
06/22/ 2010	33	ORDER of USCA as to 25 Notice of Appeal filed by Richard Lee Pollard. *Appellees' Unopposed Motion for an Extension of Time to File a Petition for Panel Rehearing and Rehearing En Banc is GRANTED. Any Petition for Rehearing or Rehearing En Banc shall be Filed on or before July 12, 2010.* (Sant Agata, S) (Entered: 06/22/2010)
07/13/ 2010	34	ORDER of USCA as to 25 Notice of Appeal filed by Richard Lee Pollard: *Appellant is directed to file a response, not to exceed 15 pages or 4200 words, to Appellees' petition for rehearing and for rehearing en banc filed with this court on July 12, 2010. The response shall be filed with the Clerk of the Court within 21 days from the date of this order.* (Hellings, J) (Entered: 07/14/2010)
08/12/ 2010	35	ORDER of USCA as to 25 Notice of Appeal filed by Richard Lee Pollard. Appellees' motion for leave to file a reply to appellant's opposition to panel rehearing and rehearing en banc is DENIED. (Lundstrom, T) (Entered:

		08/12/2010)
12/10/2010	36	ORDER and AMENDED OPINION of USCA as to 25 Notice of Appeal filed by Richard Lee Pollard. **Affirmed in part, reversed in part, remanded**. (Jessen, A) (Entered: 12/10/2010)
12/17/2010	37	ORDER of USCA as to 25 Notice of Appeal filed by Richard Lee Pollard. *The parties' joint motion to stay the mandate for 90 days pending a timely petition for writ of certiorari pursuant to Fed. R. App. P. 41(d)(2) and Ninth Circ. Rule 41-1 is GRANTED*. (Verduzco, M) (Entered: 12/20/2010)
01/26/2011	38	ORDER Denying Plaintiff's 23 Motion to Vacate Dismissal as Moot signed by Judge Oliver W. Wanger on 01/25/2011. (Flores, E) (Entered: 01/26/2011)
01/26/2011		SERVICE BY MAIL: 38 Order on Motion for Miscellaneous Relief served on Terry Craig. (Flores, E) (Entered: 01/26/2011)

APPENDIX C

Richard-Lee; Pollaerd, a Registered and Secured Property Party In Interest per UCC-1 Financing Statement Number 2000-013-0302, "without prejudice," per UCC 1-207, acting with unlimited commercial liability here by Special Appearance for Cause as a Necessity

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IN THE UNITED STATES DISTRICT COURT

Richard-Lee; Pollard, as Proper Party Injured,
Plaintiff,

– vs –

WACKENHUT CORRECTIONS CORP., d/b/a TAFT CORRECTIONAL INSTITUTITON, and SEVERAL UNKNOWN NAMED AGENTS and/or EMPLOYEE(S) thereof,
Defendants.

CIV F-01-6078 OWW HGB – P

TITLE 42 U.S.C.S. DECLARATION OF CAUSES AND REQUEST COMPLAINTS

TRIAL BY JURY REQUIRED

For and on the record, now comes the Plaintiff, Richard-Lee; Pollard, hereinafter "the Proper Party Injured," acting with unlimited commercial liability, complaining of the above listed Defendant(s), WACKENHUT CORRECTIONS d/b/a/ TAFT CORRECTIONAL INSTITUTION, and SEVERAL UNKNOWN AGENTS and/or EMPLOYEE(S) thereof, and presents the following specific averments, statements, and testimony.

For and on the record, "the Proper Party Injured," hereby certifies and swears on the unlimited commercial liability of the Proper Party Injured that, all of the following "specific averments, statements, and declarations" being presented, set forth, are true, correct, and complete, not misleading, the truth, the whole truth, and nothing but the truth, so help me GOD, and the jurisdiction of these proceedings are established in Commerce.

1. That on or about April 7th, 2001 A.D., the Defendant known as WACKENHUT CORRECTIONS CORPORATION, was/is the owner, care taker, or lessee of the Real Estate and/or property that is located on 1500 Cadet Road, Taft, California, known as Taft Correctional Institution.

2. That on or about April 7th, 2001 A.D., at 7:00 AM, "the Proper Party Injured," a Mr. Richard-Lee; Pollard, was/is a prisoner being housed upon the Defendant(s) premises.

3. That at all relevant times, "all listed Defendant(s)" named and/or unnamed, "had the contract obligation and duty" to assure and provide reasonable care for "the health, well being, safety, and prompt and proper medical treatment or care" for the Proper Party Injured.

4. That there was a condition of Defendant(s) property which presents, or presented an unreasonable risk of harm to person on the premises in one or more of the following ways:

A. Wet and slippery floor in the Butcher Shop of the Food Service Kitchen area;

B. A floor which has no proper "Anti-Slip" covering and/or grating of any kind;

C. Stacks of Pots, Pans, and Baking Sheets which are constantly stacked haphazardly on all tables, carts, and floor, which could fall on or cause to fall, all persons without sufficient warning;

D. A Medical and/or Health Services Department which lacks, and/or is in need and want of proper skilled, trained, or certified health care technicians;

E. A Medical and/or Health Services Department which lacks, or is in need and want of proper skilled, trained, or certified health care personnal which do afford prompt, immediate, and appropriate health care when such an incident presented requires these specific acts;

F. A Security staff that fails to afford an injured person the proper form of handling when escorting any such injured person to the necessary Medical Facilties ourside of the Taft Correctional Institution.

5. Defendant(s) knew, or in the exercise of ordinary and proper care, health, safety, and well being, "should have known that," the above presented conditions of the premises involved an unreasonable risk of harm to health, safety, proper care, and well being to persons on the premises.

6. Defendant(s) should have realized that persons on the premises would not realize the danger or would fail to protect themselves against it or could be reasonably exspected by the defendant(s) to proceed to encounter a known or other wise obvious danger.

7. As a direct and proximate result of the dangerous condictions in the Food Service preparation and sanitation area, i.e., the Butcher Shop specifically; the Health Servise Medical Department; and the Security staff, Escort personnal on or of the Defendant(s) premises known as Taft Correctional Institution, "the Property Party Injured," a Mr. Richard-Lee; Pllard, was severely injured by or when tripping over a stack of cooking pans setting on a cart of no more then 3inch of the floor of the Food Service Butcher Shop, which caused the "Proper Party Injured to land on both hands, forearms and elbows" which carrying a stack of empty boxes out of the Butcher Shop area, which cause the "proper Party", Mr. Richard-Lee; pollard, to fracture both elbows.

8. As a direct and proximate result of the injuries, "The Proper Party Injured," Mr. Richard-Lee; Pollard, was obliged to seek the necessary prompt medical care and treatment of and/or from Physicians and surgeons, which was not adequately provided, and as a result of the lack thereof, in addition to the injuries sustained, "The Proper Party Injured," has suffered great pain and emotional distress, was disabled and made permanently disabled, and was otherwise irreparably injured.

9. WHEREFORE, Plaintiff, "The Proper Party," prays judgment against Defendant(s) in a sum in excess of Five –Hundred Thousand Dollars ($500,000.00), in addition to attorney fees and all

related costs of this action, in addition to any other type of relief that the Jury or this Court deems appropriate.

10. Plaintiff, "The Proper Party Injured," hereby requests that a "RESTRAINING ORDER" be immediately issued against any and all Defendant(s) herein, in addition to any and all agents, employee(s) and Principals of the WACKENHUT CORRECTIONS CORP., for the prevention or prohibition of any type of retaliatory acts or actions against Plaintiff consequent to, of this complaint.

11. Plaintiff, Richard-Lee; Pollard, as "The Proper Party Injured" and Holder In Due Course protected by the Bill of Rights, hereby requests "trial by jury."

/s/ Richard Lee Pollard
Richard-Lee; Pollard
#08796-085
UNIT A-2-B
Post OFFICE Box 7001
Taft, California
93268

C. LUCAS
INTERNATIONAL
JUSTICE LEAGUE
ASSOCIATE, and, NEXT
FRIEND
P.O. Box 785
Catlin, Illinois
[61817]

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD LEE POLLARD
Plaintiff,

vs.
WACKENHUT CORRECTIONS CORP., et al.,

Mr. Rayman Andrews, Warden of TCI sued in his individual, and official capacity and marital community composed of Rayman Andrews and Mrs Jone Doe Andrews; Mrs. Margaret Minnici, sued in her individual and official capacity, and marital community composed of Mrs Margaret Minnici, and Mr John Doe Minnici; Jonathan E. Akanno, sued in his individual and official capacity, and marital community composed of Jonathan E. Akanno, and Mrs Jane Doe Akanno; Mr. Robert Spack, sued in his individual and official capacity; and marital community composed of Robert Spack, and Mrs. Jane Doe Spack; Marshall S. Lewis, sued in his individual, and official capacity, and marital community composed of Mr. Marshall s. lewis, and Mrs. Jane Doe Marshall; Mr. Bob D. Stiefer, sued in his individual and official capacity, and Marital Community composed of Mr. Bob D. Stiefer, and Mrs. Jane Doe Stiefer; Mr. John Doe Uzzle, sued in his individual and

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JURY TRIAL
DEMANDED

AMENDED
COMPLAINT

official capacity, and Marital community composed Mr. John Doe Uzzle, and Mrs Jane Doe Uzzle; Mrs. B. Maness, sued in her individual and official capacity, and Marital community composed of Mrs. B. Maness, and Mr. John Doe maness.

Defendant.

COMPLAINT

Plaintiff, Richard Lee Pollard, by and through pro se., brings this action to obtain redress for deprivation of proper medical care and Conspiracy to deprive plaintiff of his federal protected rights as herein alleged, and for intentional infliction of emotional distress and [c]ruel and unusual punishment.

JURISDICTION

1. This Court has subject matter jurisdiction pursuan to (a) 28 U.S.C. § 1331, because the case arises under the Constitution and laws of the United States; (b) 28 U.S.C. § 1343, because this action seeks redress and damages for violation of 42 U.S.C. §§ 1983 and 1985 and, in particular, the [d]ue process and equal protection provisions of the United States Constitution, including the rights protected in the Fifth and Fourteenth Amendment thereof; and (c) 28 U.S.C. § 1232, since there is diversity of citizenship and this is a civil action involving, exculsive of interest and cost, a sum in excess of $50,000.00. This Court has jurisdiction over the cause of action alleged in Counts III and IV pursuant to federal pendent jurisdiction.

VENUE

2. venue is appropriate in this judicial district under 28 U.S.C. § 1391(b), because a all of the defendants reside here, for the exception of Wackenhut Corrections Corp., and a substantial part of the events giving rise to this Complaint occurred here.

THE PARTIES

3. Plaintiff Richard Lee Pollard (hereafter "Pollard") is a citizen of the State of Washington. During the events described herein, pollard was, at all time, incarcerated in Wackenhut Corrections Corporation (hereafter "TCI") as inmate #08796-085.

4. Defendant Rayman Andrews(hereafter "Andrews") is a citizen of the State of California During the events discribed herein, Raymon was employed by Wackenhut Corrections Corporation as Warden for "TCI". As Warden he is the [A]dministrator [A]ucourant. As such, he is responsible for reviewing all administrative decision,etc. Thus, he is being sued in his individual and official capacity.

5. Wackenhut Corrections, inc. (hereafter "WCC") is a business Corporation. Corporate Headquarters is currently located at : 4200 Wackenhut Drive Building, Palm Beach, Florida 44310. Defined as a "person" in law; your being sued in your official capacity.

6. Defendant Margaret Minnici, during the events described herein was at all time the [A]dministrator for Health Services, employed by Wackenhut Corrections Corporation. Her duties consist of reviewing in patients and out patients medical

grivances. She is sued in her individual and official capacity.

7. Defendant Jonathan Akanno is a doctor, and during the events described herein; was employed by Wackenhut Corrections Corporation. Doctor Jonathan is responsible for medical evoluations during sick call and recommending specific treatment, and after care for out patient care. As such, he is being sued in his individual and official capacity.

8. Defendant Robert Spack is a Doctor, and during the events herein discribed he was employed by Wackenhut Corrections Corp., He is being sued in his individual and official capacity.

9. Defendant Marshall S. Lewis is a Doctor at Pacific Orthopedic Medical Group, located at 2619 F Street Bakersfield, Ca 93301 As Surgeon, he is being sued in his individual and official capacity

10. Defendant Bob D. Stiefer is employed by Wackenhut Corrections Corporation. Stiefer is chief of security at WCC. His responsibilities consist of transporting prisoners. At all time relevant to the events discribed herein; he was responsible for plaintiff' transportation to the hospital. He is being sued in his individual and official capacity.

11. Defendant John Doe Uzzle is currently employed by Wackenhut Corrections Corporation as the Food Service Administrator. Thus, he is being sued in his individual and official capacity.

12. Defendant Mrs B. Maness is employed by WCC as a Food Service supervisor. As such, she works directly under Mr Uzzle and she is also responsible for inmate safty measures. During the events discribed herein she was the supervisor on duty.

Thus, she is being sued in her individual and official capacity.

13. All of the Defendants have acted, and continue to act, under color of law at all time relevant to this cmplaint.

FACTS

14. on or about March 14, 2001, Plaintiff arrived at Taft Correction Institution (WCC) to serve the remainer of his federal sentence. As required by contractual agreement, all inmates are required to work, unless you are medically exempt. Plaintiff was eventually assigned to the Food Service Department, specifically the Butcher Department.

15. On or about April 7, 2001, while working that morning in the butcher shop, carrying empty boxes to be placed outside the shop, I accident tripped[2] over the Sheet pan Cart which was placed hap hazardly in front of the butcher shop door.

16. Immediately upon getting up of the floor I suddenly felt a sharp throbbing pain in my upper right forearm. However, I continued to work.[2] Mrs. B. maness witness the entire accident.

17. 7:am Plaintiff got off from work, and returned to his unit for the general Count. During the count, Plaintiff noticed that both of his forarms, couple with the excurciating pain, were badly distended. After the Count was completed, Plaintiff approached the unit officer and ask "if he could go see the doctor. The officer asked way and Plaintiff explained what had occurred. At the next movent, he was allowed to go to sick call.

18. Upon Plaintiff's arrival at the institutional infirmary; Plaintiff was instructed to return to Food

Service and have the food supervisor fill-out an Accident Report.

19. Plaintiff supervising officer, Mrs Mannes, fill-out the necessary Accident Report, and he returned to the infirmary, and gave the report to the officer on duty.

20. Eventually, Plaintiff was seen and examined by Ms. Patricia Newer, not the doctor, and both of his arms were wrapped in Ace Banages and a bilateral sling. In addition, Plaintiff was given a prescription for 200gm of Mtrin, enough for two days, and Plaintiff was scheduled for an appointment on April 9, 2001 to see the doctor at 10 Oclock am.

21. On or about April 9, 2001, Plaintiff went to the infirmary as scheduled and both arms were x-rayed by Ms Jean Turner. Doctor Jonathan Akanno, related to Plaintiff that as a result of the accident, he sustained a possible fracture of both elbows, and that he would refere my case to the Orthopedic Clinice in Bakersfield. He also give Plaintiff a prescription for (1) Tylenol #3 for 3 days.

22. On April 12, 2001, at 730:am. Plaintiff was instructed to report to Receiving and Discharge (R&D) over the public system. Plaintiff locked his locker and reported to (R&D).

plaintiff's arrival at R & D officer Williams advised him that the bilateral sling and ace bandages had to be removed. Plaintiff complained that he could not extend his arms and need the sling for support. The officer said that "that was his orders and I had to comply with them." Officer Williams approached the plaintiff and begin to unwrap the ace bandages, and remove the bilateral sling .

23. Officer Williams then offered me a jump suit to put on. While attempting to get in the jump suit,

plaintiff suffered the most excruciating pain, but the officer said she could not help it.

24. After plaintiff was forced in the jump suit, officer Adams informed him that he had to put on the Black Box for security. Plaintiff asked officer Adams to call, and he said "he had already spoken to them about your medical situation, and their response was put the Black Box on him.

25. Officer Adams and Williams proceeded to put the Black Box on the plaintiff in spite of the excruciating pain and lack of support for his arms. There actions were so outrageous in character, and extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.

26. The waist chain continuously slipped below my waist and cause the weight of the Box and chain and lock to put pressure on my forearms for 6 and one half hours.

27. At 9: a.m. we arrived at the doctor's office. However, at the doctor's office they refused to take off the black box so the doctor could examine plaintiff's elbows. After the doctor examine plaintiff, his prognosis was : (1) Contusion of both elbows; (2) Lift and Right ulnar nerve Neuropraxia at the elbows; and (3) fracture of the (Left) and (Right) radial head with the (Right) radial fracture being greater than 50% of the articular surface for traumatic synovitis of the elbows bilaterially. In addition, the doctor's recommended treatment of plaintiff suggests that the left elbow should immediately be put into a long arm posterior splint for approximately two weeks, and then x rays taken. The doctor's diagnosis further suggested that "the

elbow will require an arthrotomy with excision of the radial head./ see Exhibit (1-B).

28. Upon plaintiff's return to the institution, he was immediately escorted directly to the infirmary and seen by Patricia Newer., L.V.N. Plaintiff inquired if she was going to put the posterior split on the right arm as recommended by the doctor lewis, and her response was "We don't have the facilities or staff to put the posterior splint on your arm." Plaintiff was then given a sick-call pass for the following morning medical appointment.

29. On April 13, 01, plaintiff was seen by Jean Turner, and x rays was taken. The EKG was taken by Sandra Murch as scheduled. As a result plaintiff was scheduled for surgery for April 18, 01, by doctor Marshall S. Lewis.

30. Between April 13 through April 18, 01. plaintiff was unable to participate in the schedule 3 meals aday food service program do to his inability to carry a food tray. medical failed to provide an alternative means to feed Mr. Pollard. Plaintiff suffered great humiliation and excruciating pain. Plaintiff was unable to bathe himself for two weeks. Also medical reduced the medication and as a result, plaintiff couldn't sleep and was in continuous pain. Medical staff lack of response to plaintiff needs is consistent with prior staff conduct.

31. On April 18, 2001, 7:30 in the moring, plaintiff was summonds to R&D (Receiving and Discharge) to dress out for purposes of transportation to Tehachapi Medical Clinic for surgery by Doctor Marshall S. Lewis. As plaintiff struggled to get into the jump suit, officer Adams informed the plaintiff that he had to wear the Black Box again. Plaintiff refused. the officer explained that if he refused to put on the

Black Box, plaintiff would have to signed a waiver stating he refused the surgery.

32. Plaintiff explained that the last time he had the Black Box on, it was for 6 and one half hours, and that the pain was extreme and debilitating. The chain around his waist causes the pressure on his forearms and elbows.

33. The officer escorted plaintiff to the infirmary and explained the situation to the head RN(Name unknown)She approached plaintiff and inquired as to why he was refusing surgery. Plaintiff explained about the Black Box and how he suffered the last time he went to the doctor's office, and how he can't deal with the pain any more.

34. She told the officer not to put the Black Box on plaintiff. The officer told the head RN(name unknown) that his orders was to put the Black Box on the Plaintiff. The head RN then got on the phone and call some one. However, a few minutes a lieutenant walk in the infirmary, and approached plaintiff, and accused plaintiff of causing problems.

35. The officer and the head RN appeard to be arguing, and then she made another phone call and gave the phone to the lieutenant, and he spoke for a few minutes and then he left. The head RN told the officer that Pollard was to be traspoted without the Black Box. Subsequently plaintiff was transported to the clinic for surgery.

36. On or about April 18, 2001, plaintiff's surgery was completed and he was immediately returned to the institution by his escort. See Operative Report: (Exhibit R).

37. With both elbows and forarms in casted, plaintiff was permitted, by medical staff, to return to the unit. In spite of his debilitating condition and his inability

to carry his own food tray, he was eventually left to forge for himself.

38. to avoid going to the food service to eat and being humiliated, plaintiff was forced to auction off his (1) Radio; (2) Head phones; (3) Watch; (4) Tennis Shoes; and (5) Calculator which made it possible to purchase food items from the institutional commissary.

39. Immediately right after plaintiff had the accident in the food service, plaintiff was discharged from his job, and systematically denied worker's compensation.

40. On or about May 31, 2001, while perusing through the call-out sheet. Plaintiff notice he was scheduled to appear at work on sunday morning. However, that Saturday plaintiff went to sick-call to see the doctor but the doctor was not there and he spoke with the nurse. He explained to the nurse that he was scheduled for work that Sunday morning and that there must be a mistake because he was not formally released by the doctor. He further explained that he could bearly extend his arm full length.

41. She advised him to come back to sick call on Wednesday to see the doctor.

42. That Sunday plaintiff appeared for work. While in food service, he explained to his supervisor, Ms. Maness, that he could not fully extend his arms, and that he was never medically released from the doctor's after care, and that apparently there been a mistake. Ms. Maness response was that, "You were sent here to work and by God you are going to work."

43. Under the threat of being put in Detention Segregation, plaintiff was forced to work. Ms. Maness forced Plaintiff to sweep the entire floor in

the back of the kitchen. When Plaintiff finished sweeping the floor in the back of the kitchen, he complained to Ms. Manness about the condition of his hands and elbows, she made him mop the back kitchen floor.

44. Plaintiff showed his hands to his Supervisor, Ms. Manness, which were swollen and hand turned a deep dark purplish color. He further explained how excruciating the pain was.

45. Ms. Mannes became some what agitated, and made plaintiff wash the wall behind the Kitchen "Kettles, while they were on high, in spite of the safty regulations. However, for the next three days, plaintiff was forced to work in Food Service. He spoke to his work supervisor, Ms. Manness, and the Food Administrator, Mr. Uzzel, to know avail.

46. Eventually plaintiff went to sick call. He explained to the doctor exactly what had occurred. His reply was that, "I never medically cleared you, and you should not have been permitted to work. Doctor Jonathan E. Akanno, put me on a two week unit restriction, and light duty.

47. Immediately after the two week unit restriction, plaintiff was call back to food service. Plaintiff informed the Food Administrator, Mr. Uzzle, however, as before, nothing was done and Plaintiff was forced to work.

That Saturday, again, plaintiff was called out to work for recreation. Shoveling manure in the ball field.

As before, plaintiff explained his medical restrictions but the recreation officer said he have to work. However, plaintiff then explained his situation to officer Smith, and showed her his swollen hands, and sheadvised him to return to the unit.

48. Plaintiff strongly believe that these act were retaliatory in nature, and intentionally directed at him for pursuing his rights under the Constitution.

49. On or about June 20, 2001, plaintiff was summon to(Receiving and Discharged) and informed that he was scheduled for a follow up examination at the Tehachapi Clinic. However, the sergeant told plaintiff that he had to put on the "Black Box" for security reasons.

50. Plaintiff explained that the last time he went out to see the doctor, the nurse would not allowed the "Black Box" on the him, and that the lieutenant was made aware of the situation. The officer got on the phone and spoke with someone, and hung up the phone and said that, he was ordered to put the Box on for security reasons.

51. The Box was put on plaintiff with the waist chain. When plaintiff reached the clinic in Tehachapi, plaintiff hands were swollen do the the pressure of the waist chain and Black Box on his forearms.

52. At the clinic I was taken in a room for an x ray. However, the sergeant would not remove the Black Box for the x rays.

The doctor was called, and the Black Box was removed for the limited time to take the x Rays. When the x rays were finish, the Box was put back on.

While the doctor Marshall s. Lewis was looking at the x rays, Plaintiff Pollard showed Doctor Lewis his distended and discolored hands, due to the enormous pressure from the black box, and the wieght of the waist chain. Doctor Lewis response was that, I am only responsible for the treatment of the initial

injury, however, if you have an additional problem, you will have to consult with the institutional doctor.

53. The retalitor acts and omissions carried out by Wackenhut Corrections Corporation's agents, servents and employees who acted under its [e]xplicit and [i]mplicit instructions and supervision, during t he pertinant periods herein bind Wackenhut Corrections Corporation under the [d]octrine of agency, joint conduct, [m]aster-servent, [r]spondeat [s]uperior, and conspiracy.

54. The action of Wackenhut Corrections Corporation employees, including, but not limited to the respondent Raymon Andrews, Bob D. Stiefer, Jonathan E. Akanno, Robert Spack, Marshall s. Lewis, Mr. uzzle, Ms Margarit Minnici, and Mrs B. Mannes, were at all time taken under color of law.

COUNT I
DEPRIVATION OF CONSTITUTIONAL RIGHTS AND PRIVILEGES
(42 U.S.C. § 1983)

55. Plaintiff incorporates by reference paragraphs (1) through (54) as if fully set forth herein.

56. Plaintiff is entitled to equal protection of the law under the Fourteenth Amendment of the United States Constitution, and due process of law under the Fifth and Fourteenth Amendment of the United States Constitution.

57. As per contractual agreement, Plaintiff is entitled to the Eighth and Fourteenth Amendment protection against cruel and unusual punishment under the United States Constitution, and in accordance with the contract performance requirements.

FIRST CAUSE OF ACTION

58. The Plaintiff hereby incorporates by reference each and every allegation made in the preceding paragraph as if fully set forth herein.

59. Respondent Raymon Andrews, warden/aucourant; chief executive officer (CEO), or facility Administrator. As such, he has the ultimate on-site responsibility for the overall management and operation of the institution.

60. Specifically, he is responsible for hiring all personnel and management staff to provide for the safekeeping and care of all inmates designated to Taft Correctional Institution.

61. The warden has wantonly breached its contractual agreement, and duty by hiring and poorly tranning staff members.

62. As warden/facility Administor, he is required to perform in accordance with all standards of the most recent edition of the ACA) American Correctional Association, while meeting the applicable standards and level of quality established by OSHA for the [h]ealth and [s]afety of all inmates designated to Taft Correctional Institution.

63. As a direct and proximate result of Respondent's acts and omissions has violated Plaintiff's Constitutional Rights,

SECOND CAUSE OF ACTION

64. Respondent Mrs. Maragaret Minnici was the Medical Administrator at all times relevant to Plaintiff's complaint. The Medical Administor is generally responsible for ensuring the provision of medical care to inmates and specifically for scheduling medical appointments outside the institution when an inmate needs specialize treatment or evaluation. Thus, as a direct and

proximate result of Respondent's acts, and omissions, specifically her indifference to Plaintiff's emergency medical needs, that is, she failed to schedule Plaintiff, as recommended by doctor Lewis, for a further work-up with EMG nerve conduction studies. See Exhibit (3A). As of this date, Plaintiff suffers this medical anomaly with his hands, which violates Plaintiff's Constitutional Rights.

THIRD CAUSE OF ACTION

65. The Plaintiff hereby incorporates by reference each and every allegation made in the preceding paragraphs as if fully set forth herein.

66. Respondent Jonathan E. Akanno at all times relevant to the events described herein was Taft Correctional Institution doctor.

67. Because of doctor Akanno's failure to comply with the Orthopedic's recommendation, Plaintiff have suffered and continue to suffer the Eighth and Fourteenth Amendment deprivation of his Constitutional rights. See Exhibits (3A) and (4A)

FOURTH CAUSE OF ACTION

68. Plaintiff hereby incorporates by reference each and every allegation made in the preceding paragraphs as fully set forth herein.

69. Respondent Robert Spack at all times relevant to the events described herein was and now the doctor at Taft Correctional Institutions.

On or about November 20, 2001, Plaintiff went to sick call and was seen by LVN Sheri Picker. She examined Plaintiff . See Exhibit(5A). Plaintiff's hand was discolored and distended.

70. However, the very next day Plaintiff was called to sick-call, and was eventually examined by nurse Suzanne Snellen (NPC). See Exhibits dated

(11/21/01) (5A). As a result of nurse Snellen's examination,Plaintiff was schedule to see doctor Akanno, on 12/11/01 for a possible ertherma, cyanosis of the left hand .

71. On 12/11/01, Plaintiff medical appointment was cancelled, and he was re-schedule foe an appointment for 1/10/2002.

72. However, Plaintiff was seen by doctor Robert Spack. Doctor Robert Spack failed to perform an adequate examination. Althought Plaintiff was sufering from cyanosis, doctor Robert Spack claimed that Plaintiff's hands were not swollen, and looked normal. See Exhibit (6A).

73. Plaintiff continue to suffer the pain and discoloration and weakness of his right hand due to doctor Robert Spack' indifference to Plaintiff's medical needs.

FIFTH CAUSE OF ACTION

74. Plaintiff hereby incorporates by reference each and every allegation made in the preceding paragraphs as if fully set forth herein.

Doctor Marshall S. Lewis is a Orthopedic Surgeon, and at all times relevant to the events described herein, was contracted by Wackenhut Corporation as the outside Orthopedic doctor for the institution. On April 12, 2001, Plaintiff was transported to Pacific Orthopedic Medical Group, as a result of an accident, Plaintiff fractured both elbows, for Orthopedic evaluation by doctor Jonathan E. Akanno, the institutional doctor.

75. During doctor Lewis examination, he reviewed Wackenhut's old X-rays and determined that Plaintiff suffered contusion of both elbow.

76. It further reveal fractures of the right radial head and the left radial head. See Exhibit (302).

The doctor also notice that the left and right ulnar nerve neuropraxia at the elbow.

77. However, inlight of his suspicion that Plaintiff may have sustained nerve damage, doctor failed to conduct a MRI examination. See Exhibit (3A).

78. Doctor Lewis recommended that Plaintiff left elbow be put placed in a "long arm posterior splint for approximately two weeks and then new x-rays taken.

79. However, doctor Lewis's recommendation was never acted upon by doctor Akanno or, his staff at the institution infirmary.

80. On April 18, 2001, Plaintiff was transported to Tehachapi Surgery Center. See Exhibit (2A).

81. Plaintiff complained to doctor Lewis about his left elbow and th at the medical staff at Taft failed to place his left arm in a posterior splint as recommended on April 12, 2001. However, the doctor did not respond.

82. On May 2, 2001, Plaintiff was transported to the Tehachapi Clinic for physical examination. See Exhibit (4A). However, the doctor recommended that Plaintiff be given physical therapy.

83. Plaintiff never received physical therapy from the medical staff at Taft Correctional Institute.

84. Plaintiff was transported to the Tehachapi Clinic, and was examined by doctor Marshall S. Lewis. Plaintiff explaind to doctor Lewis about the events surrounding his being forced to work at the institution, and the condition of his left hands, swellen and disclored. Plaintiff was schedule to return for re-evaluation p.r.n.

85. As a result of doctor Lewis failure to conduct a MRI on both of Plaintiff fracture elbows, there is a

strong possibility that Plaintiff is suffering from Cyanosis/Nevrolysis in both hand.

86. Plaintiff have suffered and continue to suffer as a direct and proximate result of doctor Lewis intentional indifference to Plaintiff's medical needs.

SIXTH CAUSE OF ACTION

87. Plaintiff hereby incorporate by reference each and every allegation made in the preceding paragraph as if fully set forth herein.

88. Respondent Bob D. Stiefer was at all time relevant to the events herein described was employed by Wackenhut Corrections Corporation, under the auspices of major/Chief of security for Taft Correctional Institution.

89. As such, he is solely responsible for transporting inmates from and to the institution, and outside doctor appointments.

90. On or about April 12, 2001, Plaintiff was summoned to R & D, Receiving and Discharge, for his appointment with the Orthopedic doctor. Officer William advised Plaintiff that the bilateral sling and ace bandages had to be removed.

91. Plaintiff explained his medical condition, and that the sling supported his injured elbows. Officer Williams said that, that was his orders, and I had to comply with them.

92. Officer Williams approached the Plaintiff and begin to unwrap the ace bandage and remove the bilateral sling. Officer Williams offered Plaintiff a jumpsuit to put-no. While attempting to get in the jumpsuit, Plaintiff suffered the most excruciating pain, but the officer said I had to put it on.

93. After Plaintiff was forced into the jumpsuit, officer Adams informed the Plaintiff that he had to put the "Black Box" on for security reasons. Plaintiff

ask the officer to call the lieutenant, and the officer said "he had called already called and spoken with them about your medical situation, and they said to put the box on.

94. Officer Willaims and Adams proceeded to put the "Black Box" on the Plaintiff notwithstanding the excruciating pain and lack of supportfor his arms.

95. Their actions were so outrageous in character, and exetreme in degree, as to go beyond all possible bounds of human decency, and to be regarded as atrocious and utterly intolerable in a civilize society.

96. The waist chain continuously slipped below my waist and cause the weight of the box and chain to put pressure on Plaintiff forarms, and elbows. Plaintiff suffered this condition for 6 hours.

97. On April 18, 2001, Plaintiff was dressed out for his schedule appointment for surgery at the Techachapi Clinic. The on duty told Plaintiff that he had to put on the "Black Box" again.

98. This time Plaintiff refused to wear the "Black Box". The officer explained that if he refused to wear the Black Box, he, Plaintiff would have to sign a waiver stating his refusal. Plaintiff explained what happen on the last trip, and that he had the Box on for 6 hours, and that the pain was extreme and debilitating.

99. Plaintiff was escorted to the infirmary and was seen my the head nurse (Name unknown) and after a great deal of discussion. Plaintiff was transported with out the Black Box. On May 2, 2001, Plaintiff was again forced to wear the Black Box.

100. On June 20, 2001, Plaintiff was again transported with the Plaintiff have suffered as a direct and proximate result of the Respondent's

indifference to Plaintiff's medical needs, inviolation of Plaintiff Constitutional rights.

SEVENTH CAUSE OF ACTION

101. The Plaintiff hereby incorporate by reference each and every allegation made in the preceding paragraph as if fully set forth herein.

102. Respondent Everett Uzzle at all times relevant to the events herein described was employed by Wackenhut Corporation as a Food Service Supervisor. As such, he has the ultimate on-site responsibility for the overall management of Food Service.

103. As the Food Service Administrator, he is required to perform in accordance with all standards of the most recent edition of the American Correctional Association (ACA), while meeting the applicable standards and level of quality established by OSHA for the Health and safety of all inmate.

104. As a direct and proximate result of Respondent's acts and omission, and deliberate indifference to Plaintiff safety, has violated Plaintiff's Constitutional Rights, specifically the Eighth And Fourteenth Amendment rights.

EIGHTH CAUSE OF ACTION

105. Plaintiff hereby incorporate by reference each and every allegation made in the preceding paragraph as if set forth hereni.

105. Respondent Mrs. B. Manness at all time relevant to the events herein described was employed by Wackenhut Corrections Corporation as Food Service Supervisor.

106. As such, she is generally responsible for assigning inmates to their duties in the food service. At the time of the accident, she was the morning

supervisor on duty, and directly under Mr. John Everett Uzzle, the food service Administrator. As supervisor of the morning shift, she is generally responsible for a safe work environment.

107. As a direct and proximate result of supervisor Meness deliberate indifference to Plaintiff's safety, Plaintiff have greatly suffered and continue to suffer the permanent injury to both of his elbows, in violation of his Eighth and Fourteenth Admendments under the United States Constitution.

COUNT II

CONSPIRACY TO DEPRIVE PERSONS OF EQUAL PROTECTION OF THE LAWS

(42 U.S.C. § 1985)

108. Plaintiff hereby incorporate by reference each and every allegation made in the preceding paragraph as if fully set forth herein.

109. A. Wackenhut Corrections Corporation conspired with its agents, servents and employees, including, but not limited to Raymon Andrews, and perhaps with others currently unknown to this Plaintiff to deprive Richard Lee Pollard of equal protection of the laws and equal privileges and immunities under the laws as further set forth in (1) through (107).

OBJECT OF THE CONSPIRACY

110. B. It was part and an object of said conspiracy that Wackenhut Corrections Corporation, the defendants, and co-conspirators, would and did deprive Plaintiff of h is Fifth , Eighth and Fourteenth Amendment rights under the United States Constitution.

MEANS AND METHODS OF THE CONSPIRACY

111. C. Amongs the means and methods by which the defendants conducted its illegal actions and omissions were the following:

112. Wackenhut Corrections Corporation's agents, servent and employees who acted under its [e]xplicit and [i]mplicit instructions, and supervision, with intent to aid and abet the deprivation of Plaintiff's Constitutional rights by way of denying Plaintiff adequate medical attention in order to effectively not to exceed the medica expenditures according to the scheduled budget for that quarter.

113. The conspritors committed some acts infurtherance of the conspiracy 'which included failing to return Plaintiff to the Orthopedic clinic for re-evaluation p.r.n.). However, to avoid additional financial cost, Plaintiff's Orthopedic appointment was subsequently cancelled.

114. As a direct and proximate result of the conspiracy, Plaintiff have suffered and continue to suffer a possible neurolysisto his right and life ulnar nerve which was precipitated by trauma to the radial heads of both elbows.

COUNT III

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

115. Plaintiff hereby incorporate by reference each and every allegation made in the preceding paragraph as if fully set forth herein.

116. The conduct of Wackenhut Corrections Corporation, and its agents, servent and employees, including but not limited to the actions of Mrs Maness herein set forth was odious, perverse and

outrageous, and in strict violation of Plaintiff's Constitutional rights.

117. Not content with forcing Plaintiff to mop and sweep the entire back kitchen floor, she also forced Plaintiff to wash walls behind the kitchen Kettles while they were still being used.

118. She refuse, and Plaintiff requested that she call the infirmary, and verify Plaintiff's medical designation by the doctor. Mrs maness actions were atrocious and utterly uncalled for and wantonly intentional.

COUNT IV

RETALIATORY ACTS AGAINST PLAINTIFF

119. Plaintiff hereby incorporates by reference each and every allegation in the preceding paragraphs as if set forth herein.

120. On several occasion Respondent Bob D. Stiefer, maliciously and willfully, forced Plaintiff to put on the Black Box, although he previously was informed my the infirmary, not to put th e Black Box on due to Plaintiff's injury.

122. As a direct and proximate result of Mrs Maness malicious and retalitor action., See Exhibits 303, 304, 305, 306 and 307, she intentionally violated Plaintiff's Constitutional rights.

RELIEF REQUESTED

A. This action is brought to seek fair compensation for the injury, humiliation, mental suffering and angusih inflicted upon Plaintiff as a result of the wrongful acts of defendants. This action is also filed to ensure that these defendants and other are deterred from wilfully engaging in such wrongful activity again.

Wherefore, Plaintiff requests the following relief:

A.1 **Count I,** judgment against the Defendants Wackenhut Corrections Corporation and its agents, servents and employees, including but not limited to the Defendants Raymon Andrews, Bob D. Stiefer, Jonathan E. Akanno, Robert Spack, Marshall S. Lewis, Mr John E. Uzzle, Mrs. Margarit Minnici, and Mrs B. Maness, did act at all times under color of Law, for compensatory damages; punitive damages for the Defendant's willful, outrageous and milicious conduct, and Court fees; nominal damages, and such other and further relief as the Court may deem proper.

A.2 **COUNT II,** judgment against the Defendant Wackenhut Corrections Corporation and its agents, Raymon Andrews, Mrs. B. Maness, and Bob D. Stiefer, jointly and severally for compensatory damages; punitive damages for Defendant's wilful, outrageous and malicious acts and omissions, and Court fees; nominal damages, and such other and further relief as the Court may deem proper.

A.3 **COUNT III,** judgment against the Defendant Wackenhut Corrections Corporation and its agents, servents and employees who acted under its explicit instructions, and supervision, during the pertinent periods herein bind all the herein Defendants in the above preceding paragraphs (1) through (122) as if set forth herein; jointly and severally for compensatory damages; punitive damages for the infliction of emotional distress intentionally against the Plaintiff; Court fees; nominal damages, and such other and further relief as the Court may deem proper.

A.4 **COUNT IV,** judgment against the Defendant Wackenhut Corrections Corporation and its agents, servents and employees who acted under its explicit

and implicit instructions, and supervision, during the pertinant periods herein bind all the herein Defendants in the about preceding paragraphs (1) through (122) as if set forth herein; jointly and severally for compensatory damages; punitive damages the the malicious retalitory acts that was intentionally carry out by Mrs B. Maness, and Mrs Bob D. Stiefer, against the the Plaintiff; Court Fees; nominal damages, and such other and further relief as the Court may deem proper.

JURY TRIAL DEMANDED

Plaintiff demands a jury trial on each of the counts.

/s/Richard Lee Pollard
Respectfully Submitted,
Richard Lee Pollard,pro se.,
C/O #08796-085
P.O. Box 7001/A2B
Taft, CA 93268-7001

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PETITIONER'S BRIEF

JUL 22 2011

RECORD AND BRIEFS

No. 10-1104

IN THE

Supreme Court of the United States

MARGARET MINNECI; JONATHAN E. AKANNO; ROBERT SPACK; BOB D. STIEFER; AND BECKY MANESS,

Petitioners,

v.

RICHARD LEE POLLARD *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Court should infer a cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against individual employees of private companies that contract with the Federal government to provide prison services, where the plaintiff had adequate alternative remedies for the harm alleged and the defendants have no employment or contractual relationship with the government.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were defendants and appellees in the proceedings below, are Margaret Minneci, Jonathan E. Akanno, Robert Spack, Bob D. Stiefer and Becky Maness.

Respondent Richard Lee Pollard was the plaintiff and appellant in the proceedings below.

GEO Group, Inc. ("GEO"), sued as Wackenhut Corrections Corporation, was a defendant and appellee in the proceedings below, and the judgment of dismissal as to GEO was affirmed. GEO is a respondent supporting the petition pursuant to Sup. Ct. R. 12.6. GEO has no parent companies and FMR Inc. owns 10% or more of its stock.

Raymond Andrews, Everett Uzzle and Marshall Lewis were named in the complaint as additional defendants. Mr. Andrews was never included in the appeal from the district court's judgment. *See* Pet. App. 17a n.6. Mr. Uzzle died in 2008, *id.*, and his estate was never substituted as a party pursuant to Fed. R. App. P. 43(a). Dr. Lewis was never served with the complaint or notice of appeal and therefore was never a party in the District Court or the Court of Appeals. Pet. App. 17a n.6. Because these individuals were not parties to the proceedings in the Court of Appeals or named in that court's judgment, they are not parties to this proceeding. *See* Sup. Ct. R. 12.6.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The decision of the Ninth Circuit, as amended, is reported at 629 F.3d 843 and reproduced at page 1a of the Appendix to the petition ("Pet. App."). The unpublished order of the District Court is reproduced at Pet. App. 70a. The District Court's order adopted an unpublished recommendation of a Magistrate Judge, which is reproduced at Pet. App. 73a.

JURISDICTION

The judgment of the Ninth Circuit was entered on June 7, 2010, and the panel amended its opinion on

December 10, 2010. Pet. App. 1a. The Ninth Circuit denied a timely filed petition for rehearing *en banc* on December 10, 2010, with eight judges dissenting. Pet. App. 4a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

INTRODUCTION

The question in this case is whether the Court should, for the first time in more than 30 years, extend the judicially-created right of action of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to a new context and a new category of defendants—employees of a private company that contracts with the Federal government to provide prison management services. The Court should not, and should instead leave that question to the policy judgment of Congress.

The Court has consistently held that the narrowly-circumscribed *Bivens* right of action will not be extended unless the plaintiff lacks any adequate alternative remedy—including under state law—for the harms alleged. And even if there is no such remedy, the Court still will not create a *Bivens* remedy if there are any special factors that "counsel hesitation." Both considerations preclude creation of a *Bivens* remedy in this case, whether considered separately or together. Respondent not only had adequate state law remedies for the harms he alleges, but those remedies are superior to his putative *Bivens* remedy under the Eighth

Amendment, which would require him to meet a far more onerous burden. Moreover, petitioners' status as private employees rather than government officials, at a minimum, gives rise to special factors counseling hesitation. Unlike their Federal government counterparts, petitioners lack the recognized governmental immunities that led to creation of the *Bivens* doctrine in the first place, raising the specter of asymmetrical liability as compared to actual government employees. And whereas Congress has shielded Federal government employees from ordinary tort liability while expressly preserving constitutional claims against them, Congress has done the opposite with respect to petitioners and other employees of contractors.

Far from simply filling a remedial gap, creation of a new *Bivens* right of action here would multiply respondent's remedies, subjecting petitioners to liability not faced by their Federal government counterparts. As this Court has consistently held over the last three decades, such a decision should be made by Congress after weighing all the relevant policy considerations, rather than by this Court through what would amount to an exercise in judicial lawmaking.

STATEMENT OF THE CASE

A. Facts.

Respondent Richard Lee Pollard is a federal prisoner sentenced in 1996 to 20 years imprisonment for drug trafficking and firearms offenses. *United States* v. *Pollard*, No. 95-CR-145 (E.D. Wash.). While in prison, Pollard has been a "frequent filer" in the federal courts, having filed at least ten other civil actions in addition to this one. *See* Pet. 4 n.1.

Pollard originally filed a *pro se* complaint in this action in 2001 when he was an inmate at the Taft Correctional Institution ("TCI") in California. TCI was then managed by Wackenhut Corrections Corporation, now known as The GEO Group, Inc., under contract with the Federal government as directed by Congress. *See* Pet. App. 5a n.4; S. Rep. No. 104-353, at 36-37 (1996) (directing Bureau of Prisons to use appropriated funds for privatization of TCI).

Pollard's initial 2001 complaint principally alleged that an unreasonably dangerous condition caused him to trip over a cart outside the TCI butcher shop where he was working. JA21-25. That complaint was dismissed with leave to amend. JA14, Dkt. 9.

In 2002, Pollard filed an amended complaint that no longer sought damages for the initial fall. JA26.[1] According to the amended complaint (whose facts are taken as true for purposes of this appeal) the accident occurred on April 7, 2001. JA30. Afterwards, TCI medical personnel bandaged Pollard's arms, put them in a sling, and scheduled him to see a doctor on the morning of April 9. JA31. The doctor, respondent Jonathan Akanno, diagnosed possible fractures of both elbows, prescribed an analgesic, and referred Pollard to an outside clinic in Bakersfield. *Id.*

On April 12, Pollard reported to the discharge unit to go to the outside appointment. A security guard removed the bandages and sling and told Pollard to put on a jump suit, which caused him pain. JA31-32. The guards also required Pollard to wear a "black box" security device. JA32. The complaint does not

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[1] Although the amended complaint references various exhibits, there are no exhibits in the District Court's record.

further describe the "black box," but the term generally refers to a plastic box that covers the lock of a prisoner's handcuffs. A chain runs through the box and around the prisoner's waist and secures his hands to his stomach. *See May* v. *Baldwin*, 109 F.3d 557, 564 (9th Cir. 1997); *Knox* v. *McGinnis*, 998 F.2d 1405, 1407 (7th Cir. 1993); *Moody* v. *Proctor*, 986 F.2d 239, 240 n.3 (8th Cir. 1993) (use of black box does not contravene Eighth Amendment); *Fulford* v. *King*, 692 F.2d 11 (5th Cir. 1982) (same). Pollard alleges that he had to wear the black box to the outside visit despite claiming that it did not adequately support his injured arms and caused him pain. JA32. He alleges that the chain slipped below his waist, which put pressure on his arms for 6 1/2 hours. *Id.*

At the outside clinic, Pollard was diagnosed with injuries to his arms, including fractures, and was told he would need a splint and then surgery. JA32-33. Upon returning to TCI, however, he was told there were no facilities for putting on a splint. JA33; JA42.

The next day, April 13, Pollard was x-rayed and scheduled for surgery on April 18. JA33. Pollard alleges that from April 13-18, he could not "participate in the schedule[d] 3 meals a day food service program [due] to his inability to carry a food tra[y]" and that the medical staff "failed to provide an alternative means to feed [him]." *Id.* Pollard also alleges that he could not bathe himself for two weeks and that because his medication level was reduced he could not sleep and was in pain. *Id.*

On April 18, Pollard had the surgery at an outside clinic. This time, in response to his complaints, he was not required to wear the black box. JA33-34.

Pollard alleges that, after the surgery, "[i]n spite of his debilitating condition and his inability to carry his own food tray, he was eventually left to for[a]ge for himself." JA34-35. He alleges that "to avoid going to the food service to eat and being humiliated," he auctioned off personal items to purchase food from the commissary. JA35.

On May 2, Pollard was transported to an outside clinic for an examination, and the doctor recommended physical therapy. JA42. He alleges that he never received that therapy. *Id.*

On May 31, over six weeks after the surgery, Pollard was scheduled for work. JA35. He complained about difficulty extending his arms. The following Sunday, he appeared for work and was required to sweep the floor. His hands were swollen and discolored and he was in pain. JA35-36. He was required to work the next three days. JA36. Pollard then went to sick call and the doctor said he should not have been permitted to work and put him on a two-week restriction. *Id.* After that period, he was told to report for work again. *Id.* But when he explained his situation to the supervisor and showed his hands, he was told to return to his unit. *Id.*

On June 20, Pollard was required to wear the black box for a follow-up trip to clinic. He alleges that this caused his hands to swell. JA37.

Pollard also alleges that respondent Margaret Minneci, who was the Medical Administrator at TCI, failed to schedule "a further work-up with EMG nerve conduction studies" which caused him to suffer a "medical anomaly with his hands." JA39-40. And he alleges that in January 2002, he was seen by another TCI doctor, respondent Robert Spack, who

failed to perform an adequate examination and failed to diagnose Pollard with a condition called cyanosis. JA40-41.

B. Proceedings In The District Court.

Pollard's amended complaint asserted damages claims against Wackenhut (now GEO) and eight individual defendants (seven of whom were GEO employees) alleging violation of his Eighth Amendment rights. Pet. App. 16a. Five of these GEO employees (all of whom are now former employees) remain parties to the case. *See supra* at ii. As noted, Ms. Minneci was the TCI Medical Administrator, and Drs. Akanno and Spack were doctors at the facility. JA28-29; JA40-41. Respondent Bobby Stiefer was Chief of Security, and respondent Becky Maness was the Food Service Supervisor. JA29-30; JA43; JA45.

Pursuant to 28 U.S.C. § 1915A(b)(1), which requires pre-screening of *pro se* prisoner complaints, a Magistrate Judge recommended that the amended complaint be dismissed because Pollard lacked an implied remedy under *Bivens*. The Judge found that Pollard "has alternative and superior remedies available to him in state court." Pet. App. 79a & n.1. And relying on decisions of the Fourth and Tenth circuits, the Judge concluded that

> extending *Bivens* would not provide Plaintiff with an otherwise nonexistent cause of action. Nor would extending *Bivens* deter future unconstitutional conduct by federal officers as the Defendants are employees of a private corporation. As such, the court finds that this case does not present circumstances warranting the extension of *Bivens*.

Pet. App. 80a. After a *de novo* review, the District Court adopted the Magistrate Judge's recommendation in full, and dismissed the case. *Id.* at 71a.

C. Proceedings In The Court Of Appeals.

1. Pollard, by then represented by counsel, appealed to the Ninth Circuit. Expressly rejecting the holdings of the other circuits to have considered the issue,[2] a divided panel held that "Pollard's suit under *Bivens* against the GEO employees for alleged violations of his Eighth Amendment rights should be allowed to proceed" because (1) the GEO employees act "under color of federal law" for purposes of *Bivens* liability; and (2) "state tort remedies alone are insufficient to displace *Bivens* and there are no 'special factors counselling hesitation' in allowing Pollard's suit to proceed." Pet. App. 52a.

The majority stated that "the mere availability of a state law remedy does not counsel against allowing a *Bivens* cause of action." *Id.* at 35a. In its view, "only remedies crafted *by Congress*" can suffice as adequate alternatives to a *Bivens* remedy. *Id.* at 35a-36a (emphasis in original). The majority was also concerned that "[i]f we were to allow state tort law to preclude a *Bivens* action for Pollard and similarly situated prisoners, the liability of federal officials for constitutional violations would no longer be governed by uniform rules." *Id.* at 40a. The majority then found no special factor that might counsel hesitation before extending *Bivens* to this context. *Id.*

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[2] *See Holly* v. *Scott*, 434 F.3d 287, 296 (4th Cir. 2006); *id.* at 303 (Motz, J., concurring); *Alba* v. *Montford*, 517 F.3d 1249 (11th Cir. 2008); *see also Peoples* v. *CCA Det. Ctrs.*, 422 F.3d 1090 (10th Cir. 2005), *vacated in relevant part by equally divided court*, 449 F.3d 1097 (10th Cir. 2006) (*en banc*).

2. Judge Restani of the Court of International Trade, sitting by designation, dissented. She concluded that the majority erred in rejecting the holdings of the other circuits. As she explained, this Court has extended *Bivens* "only where federal officials, by virtue of their position, enjoy impunity, if not immunity, from damages liability because of gaps or exemptions in statutes or in the common law." *Id.* at 53a. Here, ordinary tort remedies for negligence provided an "adequate, alternative, existing process, for protecting Pollard's interest." *Id.* at 56a. Moreover, such remedies are more "easily obtained" than a *Bivens* remedy. *Id.* at 56a-57a. Given the availability of a "superior alternative remedy," Judge Restani would not have extended *Bivens*, which she viewed as a decision "'better left to legislative judgment.'" *Id.* at 58a (citation omitted).

Unlike the majority, the dissent found that under this Court's precedents an "alternative remedy need not be a federal remedy." *Id.* at 59a. Judge Restani also disagreed that potential differences in state procedural rules or damages caps required a *Bivens* remedy. *Id.* at 63a. And she concluded that recognizing a *Bivens* action here "may impose asymmetrical liability costs, as a plaintiff currently may assert tort claims against private prison employees, while *Bivens* actions allow for recovery from federal employees where the FTCA otherwise bars tort claims against them," and given that "plaintiffs may be able to recover from private prison employees more often than from federal prison employees because private prison employees are not entitled to qualified immunity." *Id.* at 68a.

3. The panel denied rehearing (while amending its opinion in minor respects) and the full Ninth

Circuit denied rehearing *en banc* over the dissents of eight judges. *Id.* at 2a-4a. Writing for the dissenters, Judge Bea emphasized that the panel majority had "disregard[ed] the Supreme Court's narrowing instructions on *Bivens*, which have limited recognition of new *Bivens* actions to those situations where, for one reason or another, damages were unavailable under both state and federal law," and that its "unprecedented" opinion "extends *Bivens* far beyond its carefully prescribed contours and places this circuit in direct conflict with each of the other circuits to address the issue." *Id.* at 4a-5a.

Rejecting the majority's "abstract claim of 'lack of uniformity'" resulting from failing to recognize a *Bivens* action, the *en banc* dissenters explained that these qualms were irrelevant because Pollard "has not shown—because he cannot—that there is any state which does not provide recovery for that most fundamental tort claim" of negligence. *Id.* at 11a. This made "the panel's lack of uniformity preoccupation * * * as imagined as is any legal support for its assertion that state law remedies cannot, on their own, preclude recognition of a *Bivens* action." *Id.*

SUMMARY OF THE ARGUMENT

This Court has repeatedly stressed that it will not exercise its quasi-legislative power to extend the *Bivens* doctrine to a new context or new class of defendants except in narrow circumstances where the plaintiff lacks any alternative remedy for the harms alleged and no special factor counsels hesitation. Where either of these criteria is not met, the Court has stayed its hand and instead has left the matter to Congress, which is better equipped to balance competing policy considerations. That is what the Court should do here.

Pollard not only had adequate alternative remedies for the harms he alleges, but those remedies are superior to what he would have under *Bivens*. In all three cases in which this Court has previously inferred a *Bivens* right of action, the plaintiff lacked such remedies, including under state law. Thus, as this Court squarely held in *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 70 (2001), and contrary to the Ninth Circuit majority's view, the existence of adequate state law remedies is reason enough to decline to extend *Bivens*. As in *Malesko*, Pollard's state law remedies are not only adequate but superior to a putative *Bivens* claim under the Eighth Amendment. Whereas Pollard would have to prove, at most, negligence to prevail on state law claims, the *scienter*-based Eighth Amendment "deliberate indifference" standard would be far more difficult to meet. The Ninth Circuit's speculation about whether adequate remedies would exist in other hypothetical cases not before the Court is not only irrelevant to the disposition of this case, but unfounded.

The existence of adequate alternative remedies is itself reason to decline to recognize a *Bivens* right of action. But there are also special factors counseling hesitation, stemming from the fact that, at the time of the events at issue, petitioners were not employees of the government but rather employees of a private contractor. As such, they lack the recognized qualified immunity defenses of their government counterparts, which raises the specter of asymmetrical liability and eliminates a key concern that originally led to the creation of the *Bivens* doctrine for claims against government employees. Moreover, Congress's expressed intent as to employees of government contractors is the opposite of the legislative

intent that this Court found dispositive in authorizing *Bivens* claims against government employees. Congress has expressly preserved *Bivens* claims against government employees while pre-empting all tort claims against them in favor of a remedy against the United States that this Court deemed an inadequate substitute to *Bivens* claims. But for petitioners and other employees of government contractors, Congress did the opposite. It deliberately excluded them from the FTCA, thereby leaving state law claims in place while expressing no intent to preserve any *Bivens* claims.

For all these reasons, the Court should leave the creation of a new federal remedy in this context to Congress, just as the Court has done in every other *Bivens* case it has faced in the last 31 years. Congress is in a far better position to evaluate whether to create a new remedy that could have the effect of increasing government contracting costs and spawning a host of new federal court prisoner litigation.

ARGUMENT

I. THE COURT WILL NOT RECOGNIZE A *BIVENS* RIGHT OF ACTION EXCEPT IN NARROW CIRCUMSTANCES.

In *Bivens*, the Court recognized an implied damages remedy against federal officers alleged to have violated a plaintiff's Fourth Amendment rights. In more than 40 years, the Court has extended that holding only twice, to provide "an otherwise nonexistent cause of action" against a federal officer alleged to have acted unconstitutionally, and to provide a cause of action for a plaintiff "who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct." *Malesko*, 534

U.S. at 70 (emphasis in original) (discussing *Davis* v. *Passman*, 442 U.S. 228 (1979), and *Carlson* v. *Green*, 446 U.S. 14 (1980)).

Since the last extension of the doctrine more than 30 years ago, the Court has "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988); *see also FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994) (same). Because implied causes of action are "disfavored," the Court has been "reluctant to" and has "consistently refused to" extend *Bivens* liability "to any new context or category of defendants." *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1948 (2009); *Malesko*, 534 U.S. at 68. *See also Malesko*, 534 U.S. at 75 (Scalia, J., joined by Thomas, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action" and prior cases should be limited "to the precise circumstances that they involved"); *Wilkie* v. *Robbins*, 551 U.S. 537, 568 (2007) (Thomas, J., joined by Scalia, J., concurring) (same); Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2007 Cato Sup. Ct. Rev. 23, 26 (2007) ("[T]he best that can be said of the *Bivens* doctrine is that it is on life support with little prospect of recovery."). Indeed, since 1980, the Court has declined to extend *Bivens* in all seven cases in which it has faced the issue.[3]

In *Wilkie*, 551 U.S. at 550, the Court set forth a two-step framework for deciding whether to

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[3] *See Wilkie*, 551 U.S. 537; *Malesko*, 534 U.S. 61; *Meyer*, 510 U.S. 471; *Schweiker*, 487 U.S. 412; *United States* v. *Stanley*, 483 U.S. 669 (1987); *Chappell* v. *Wallace*, 462 U.S. 296 (1983); *Bush* v. *Lucas*, 462 U.S. 367 (1983); *see also Hui* v. *Castaneda*, 130 S. Ct. 1845 (2010) (finding statute preclusive).

recognize a *Bivens* right of action. First, the Court asks "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* But "even in the *absence* of an alternative, a *Bivens* remedy is a subject of judgment: 'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.'" *Id.* (quoting *Bush*, 462 U.S. at 378) (emphasis added).

As the Second Circuit has noted, the threshold for staying the Court's *Bivens* hand even where no adequate alternative remedy exists—"that a factor 'counsels hesitation'—is remarkably low. It is at the opposite end of the continuum from the unflagging duty to exercise jurisdiction. Hesitation is a pause, not a full stop, or an abstention; and to counsel is not to require. 'Hesitation' is 'counseled' whenever thoughtful discretion would pause even to consider." *Arar* v. *Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009) (*en banc*). In these circumstances, "'Congress is in a far better position than a court to evaluate the impact of a new species of litigation' against those who act on the public's behalf." *Wilkie*, 551 U.S. at 562 (quoting *Bush*, 462 U.S. at 389).

Here, Pollard's putative *Bivens* remedy fails at both steps of the analysis. He not only had adequate alternative remedies for the harm he alleges, but those remedies were in fact superior to a *Bivens* remedy. And in any event, the fact that petitioners are employees of a private government contractor, rather than actual government officials gives rise to

factors counseling hesitation, given that private employees lack the recognized immunities from both tort and constitutional claims that their governmental counterparts enjoy.

II. POLLARD HAD ADEQUATE ALTERNATIVE REMEDIES FOR THE HARMS HE ALLEGES.

In all three of the cases where this Court has recognized a *Bivens* right of action—*Bivens* itself, *Davis*, and *Carlson*—the plaintiffs lacked any alternative remedy for redress of their injuries, including under state law. In this case, by contrast, Pollard had adequate—indeed, superior—alternative remedies.

A. The Court Has Recognized A *Bivens* Right Of Action Only When No Alternative Remedies Existed.

In *Bivens*, federal officers entered and searched Bivens' apartment without a warrant, allegedly in violation of the Fourth Amendment. The lower court had found, and the government argued to this Court, that there was no need to infer a damages remedy directly under the Constitution because Bivens could obtain relief under state tort law. 403 U.S. at 390-91. This Court disagreed, because the interests protected by state law of trespass and invasion of privacy may be "inconsistent [with] or even hostile" to the interests protected by the Fourth Amendment. *Id.* at 394. Whereas the tort of trespass is normally defeated if the putative intruder "demands, and is granted, admission to another's house," when a federal officer seeks entry "a claim of authority to enter is likely to unlock the door as well." *Id.* at 394-95. The only way to preserve a trespass claim was therefore "'the alternative of resistance, which may

amount to crime.'" *Id.* at 395 (citation omitted). *See Malesko*, 534 U.S. at 73 (in *Bivens*, "lack of resistance alone might foreclose a cause of action in trespass or privacy"). Since the case involved "no special factors counseling hesitation in the absence of affirmative action by Congress," *Bivens*, 403 U.S. at 396, the Court recognized an implied damages remedy directly under the Fourth Amendment.

In *Davis*, a Congressional aide alleged that she was terminated on the basis of her sex, in violation of the Fifth Amendment. It was undisputed that Davis had no remedy under state law, 442 U.S. at 245 n.23, and since the defendant was no longer a Congressman at the time of suit, administrative and injunctive remedies such as reinstatement were no longer effective. Therefore, there were "no other alternative forms of judicial relief." *Id.* at 231 n.4, 243 n.21, 245. "For Davis, like Bivens, 'it [was] damages or nothing.'" *Id.* at 245 (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring)); *see also Malesko*, 534 U.S. at 67 ("In *Davis*, we inferred a new right of action chiefly because the plaintiff lacked any other remedy for the alleged constitutional deprivation.").

In *Carlson*, an administratrix of an estate sued on behalf of her son, who died in federal prison allegedly because of the deliberate indifference of the prison staff to his serious medical needs in violation of the Eighth Amendment. It was undisputed that the plaintiff lacked an adequate state law remedy for those harms because of an Indiana statute barring most survivorship claims. 446 U.S. at 17 n.4. The administratrix would have been limited, at most, to out-of-pocket expenses incurred in connection with

the death.[4] Accordingly, the Court found that a *Bivens* remedy presumptively existed, *id.* at 18, and then analyzed whether that cause of action was "defeated" either because there were "special factors counselling hesitation" or because Congress had expressly provided a substitute remedy it viewed as equally effective. *Id.* at 18-19.

On the first issue, the Court held that "even if requiring [petitioners] to defend respondent's suit might inhibit their efforts to perform their official duties; the qualified immunity accorded them under *Butz* v. *Economou*, 438 U.S. 478 (1978), provides adequate protection." *Carlson*, 446 U.S. at 19. On the second, the Court held that the FTCA did not evidence Congress's intent to "pre-empt" the *Bivens* remedy the Court found otherwise available. *Id.* Rather, it held that Congress intended to allow, for Federal government employees, both FTCA claims against the United States and *Bivens* claims against the employees, who could not be sued under the FTCA, where the United States is the only defendant. The Court found it "crystal clear that

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[4] The lower courts had given two reasons. The court of appeals had held that all recovery was barred by a state law providing that personal injury claims did not survive death where the acts complained of caused the victim's death. *See id.* (citing Ind. Code § 34-1-1 (1976)). The district court had dismissed the case for failure to meet the federal jurisdictional threshold based on another state statute allowing personal representatives, other than spouses, dependent children or dependent next of kin (which the victim did not have) to recover only out-of-pocket hospital, medical, funeral, and estate administration expenses. *See id.* (citing Ind. Code § 34-1-2 (1976)); *Green* v. *Carlson*, 581 F.2d 669, 672 & n.4 (7th Cir. 1978). This Court found it unnecessary to resolve that state law conflict. *Carlson*, 446 U.S. at 17 n.4.

Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Id.* at 19-20.

The Court then examined four "additional" factors supporting its conclusion "that Congress did not intend to limit respondents to an FTCA action." *Id.* at 21. First, "[b]ecause the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States." *Id.* *See Malesko*, 534 U.S. at 67-68 ("In *Carlson*, we inferred a right of action against individual prison officials where the plaintiff's only alternative was [an FTCA] claim against the United States," which "was insufficient to deter the unconstitutional acts of individuals"). Second, the Court noted that although precedents "indicate" that punitive damages "may" be available in *Bivens* suits, the FTCA prohibits them. *Id.* at 21-22. Third, the FTCA prohibits jury trials. *Id.* at 22. Fourth, whereas the FTCA tracks state law—which, as noted, provided no recovery in *Carlson*—the *Bivens* action the Court had already found presumptively available would be governed by uniform federal rules rather than incorporating state survivorship law. *Id.* at 23.

Thus, in *Carlson* the plaintiff had no adequate state law remedy and it was "crystal clear" that Congress viewed the FTCA and *Bivens* as parallel, complementary causes of action. *Id.* at 19-20. Since *Carlson*, those issues have further crystallized. When *Carlson* was decided, it was unclear whether federal employees enjoyed absolute immunity from state tort claims. But after this Court decided otherwise in *Westfall* v. *Erwin*, 484 U.S. 292 (1988), Congress immediately overruled that decision in the Westfall Act by making the FTCA remedy against the United States exclusive for government

employees. *See* 28 U.S.C. § 2679(b)(1). At the same time, Congress expressly preserved all constitutional claims "against an employee of the Government." *Id.* § 2679(b)(2)(A). Accordingly, there now are no tort remedies—state or federal—against federal employees covered by the FTCA, except the *Bivens* claims expressly preserved against those employees.

As this Court has summarized, remedies were inferred in these three cases because "Davis had no other remedy, Bivens himself was not thought to have an effective one, and in *Carlson* the plaintiff had none against Government officials." *Wilkie*, 551 U.S. at 555. Since then, the Court has routinely declined to infer *Bivens* causes of action even where the plaintiff did *not* have adequate alternative remedies. *See, e.g.*, *Schweiker*, 487 U.S. at 425 (rejecting claim even though "a *Bivens* remedy would obviously offer the prospect of relief for injuries that must now go unredressed"); *Bush*, 462 U.S. at 388 (no *Bivens* remedy even though "existing remedies do not provide complete relief for the plaintiff"); *cf.* *Wilkie*, 551 U.S. at 554 (finding no *Bivens* remedy despite the "inadequacy of discrete, incident-by-incident remedies").

In *Malesko*, the Court declined to recognize a *Bivens* right of action in a case very similar to this one, where the plaintiff had alternative state law remedies. There, a prisoner brought suit against a private prison management company that contracted with the Federal government to operate the halfway house where he was detained, alleging a violation of the Eighth Amendment when he suffered a heart attack after negligently being forced to climb several flights of stairs. The Court understood the issue to

be whether to "extend" *Bivens* to actions against private entities. 534 U.S. at 63.

Malesko, like Pollard here, "contend[ed] that the Court must recognize a federal remedy at law wherever there has been an alleged constitutional deprivation, no matter that the victim of the alleged deprivation might have alternative remedies elsewhere * * *." *Id.* at 66. Malesko's alternative remedies, however, were "at least as great, and in many respects greater, than anything that could be had under *Bivens*." *Id.* at 72. As the Court explained, "federal prisoners in private facilities enjoy a parallel tort remedy that is unavailable to prisoners housed in Government facilities." *Id.* at 72-73. Specifically, Malesko's allegations stated a "quintessential claim of negligence," whereas "the heightened 'deliberate indifference' standard of Eighth Amendment liability would make it considerably more difficult for [him] to prevail than on a theory of ordinary negligence." *Id.* at 73 (quoting *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976)). This made the case "altogether different from *Bivens*, in which [the Court] found alternative state tort remedies to be 'inconsistent or even hostile' to a remedy inferred from the Fourth Amendment." *Id.* (citation omitted).

Malesko was therefore "not a plaintiff in search of a remedy" like Bivens or Davis, "nor does he seek a cause of action against an individual officer, otherwise lacking, as in *Carlson*." *Id.* at 74. Instead, Malesko sought "a marked extension of *Bivens*" and "[t]he caution toward extending *Bivens* remedies into any new context, a caution consistently and repeatedly recognized for three decades, foreclose[d] such extension." *Id.*

Malesko did not decide whether individual employees of private prison contractors could be sued under *Bivens*. *See* 534 U.S. at 65 ("the parties agree that the question whether a *Bivens* action might lie against a private individual is not presented here"). But the Court's reasoning compels the same result here. As in *Malesko*, Pollard is not a plaintiff in search of a remedy, and he did not lack alternative causes of action against the individuals he says harmed him. Rather, as explained more fully below, Pollard, like Malesko, had adequate alternative state tort remedies that the plaintiffs in *Bivens*, *Davis*, and *Carlson* lacked.

B. Alternative Remedies Need Not Be Federal.

Malesko, and *Bivens* itself, conclusively rebut the Ninth Circuit majority's view that "only remedies crafted by *Congress*" can ever be adequate alternatives to a *Bivens* remedy. Pet. App. 35a. As explained in *Malesko*, *Bivens* has been extended only to provide "an otherwise nonexistent cause of action" against individual officers or to provide one for a plaintiff "who lacked *any alternative remedy*." 534 U.S. at 70 (emphasis in original). "Where such circumstances are not present, [the Court has] consistently rejected invitations to extend *Bivens*." *Id.*

Thus, in *Malesko*, the Court placed dispositive reliance on the existence of a state tort remedies against private prison management companies and their employees. *See Wilkie*, 551 U.S. at 551 (characterizing *Malesko* as a case "considering [the] availability of state tort remedies in refusing to recognize a *Bivens* remedy"). Although the Court also noted the availability of internal Bureau of Prison ("BOP") grievance procedures, *id.* at 74 (citing

28 C.F.R. § 542.10 (2001)), the Court made clear that the availability of state tort claims was what made Malesko's situation "altogether different from *Bivens*." *Id.* at 73. The cited BOP procedures do not provide for damages, and the Court nowhere indicated that they sufficed as adequate alternative remedies to a *Bivens* claim. Rather, as the Court made clear, it was the lack of any adequate state tort law claim that served as the predicate for inferring a claim in *Bivens* itself. *See also Alba*, 517 F.3d at 1254 (the Court "in *Bivens* itself expressed concern that Bivens could not recover damages against the federal narcotics agents under state tort law").

More recently, in *Wilkie*, the Court likewise considered the availability of state tort remedies in evaluating the first step of the *Bivens* analysis. *See* 551 U.S. at 551 ("in each instance, Robbins had a civil remedy in damages for trespass"); *id.* at 554 (noting "patchwork" of remedies, including "state" courts applying "common law rules"). If those remedies are always irrelevant to the inquiry, as the Ninth Circuit believed, there would have been no reason for the Court to have even discussed them.

Malesko, which arose in virtually the same context as this case, refutes the Ninth Circuit's argument that the existence of state tort remedies cannot preclude resort to *Bivens*. *See* Pet. App. 59a (Restani, J., dissenting) (holding is "wrong because the Supreme Court actually has considered remedies not crafted by Congress, and *Malesko* itself is one instance in which the Court declined to recognize a *Bivens* remedy because of state remedies"). But the panel majority's rationales for rejecting reliance on state law remedies are in any event flawed.

The majority focused first on scattered statements in the Court's *Bivens* jurisprudence regarding whether Congress had crafted remedies expressly displacing a *Bivens* remedy. Pet. App. 35a-36a. These cases, however, involved questions of "express *Bivens* preemption by a statute." Pet. App. 60a (Restani, J., dissenting) (quotation and citation removed). In *Carlson*, for example, there was no state law remedy, and the Court therefore considered whether the federal FTCA displaced the *Bivens* remedy it viewed as otherwise available. In *Malesko*, by contrast, there were adequate state law remedies and no analysis of any federal statute was either urged or necessary. *Id.* The same is true here.

The panel majority also focused on the lack of "uniformity" in relying on adequate state law remedies. Once again, *Malesko*'s reliance on just such remedies in this very context disposes of this argument. But regardless, if a state law tort claim is adequate to redress a claimed injury—as is the case here, *see infra* at 25-35—it is immaterial that a plaintiff elsewhere might face different procedural requirements or be subject to different damages caps. Such requirements merely place all plaintiffs on the same footing when they bring suit for the same sorts of injuries in a particular jurisdiction. *Alba*, 517 F.3d at 1255. Alternative federal remedies can suffice to displace *Bivens* even when they "do not provide complete relief for the plaintiff." *Bush*, 462 U.S. at 388. It follows, then, that alternative state remedies suffice when they do provide adequate relief, albeit subject to the same kinds of procedural requirements faced by other claimants. Indeed, the uniformity argument cannot help Pollard here, given that, as in *Malesko*, his "uniform" federal remedy is

far inferior to his state law claim. *Malesko*, 534 U.S. at 72; *infra* at 28-29.

As *Malesko* demonstrates, *Carlson* announced no rule that alternatives to *Bivens* must always be governed by uniform, federal rules. *Carlson* did note that "the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules." 446 U.S. at 23 (citing Part III of Court's opinion). But this was just one of four "additional factors" supporting the Court's previous conclusion "that Congress did not intend to limit respondent to an FTCA action." *Id.* at 20-21. Rather than justifying the creation of a *Bivens* remedy, the statement regarding uniform rules presupposed its existence. Moreover, the accompanying citation to Part III of the Court's opinion, *see id.* at 23-24, shows that the Court merely concluded that the *Bivens* action already deemed appropriate should not be governed by state survivorship rules, which would have entirely abrogated the claim of the administratrix, Ms. Green. Since she had no state law remedy, thus justifying a federal *Bivens* remedy, incorporating state law survivorship rules into that *Bivens* claim would have been counterproductive.

That analysis has no relevance to this case. As next shown, Pollard, unlike Ms. Green, Mr. Bivens, and Ms. Davis, had adequate alternative remedies for the harm he alleged. Accordingly, just as in *Malesko*, there is no need for this Court to exercise its extraordinary quasi-legislative power to infer a private right of action found neither in the Constitution nor in any statute.

C. Pollard Had Superior Alternative Remedies.

Even the Ninth Circuit majority did not deny that Pollard had alternative state law remedies available to him. Instead, it concluded that "the mere availability of a state law remedy does not counsel against allowing a *Bivens* cause of action." Pet. App. 35a. As in *Malesko*, there can be no serious question that Pollard's remedies were "at least as great, and in many respects greater, than anything that could be had under *Bivens*." 534 U.S. at 72.

Importantly, the question is not whether Pollard would have won or lost had he raised state law claims. In petitioners' view, he would have lost on state law claims just as surely as he would lose on his constitutional claims. The question is whether Pollard's factual allegations, as pleaded, would have failed to state a claim as a matter of state law, but nevertheless succeed in stating a claim under the Eighth Amendment. The answer is no, because Pollard's available state law remedies are superior to what he would have under *Bivens*. *See* Pet. App. 10a (Bea, J., dissenting); Pet. App. 56a-57a (Restani, J., dissenting).

1. All of Pollard's claims arise from allegations that he received negligent medical diagnosis and follow-up care for his injured elbows. Some of these claims involve allegations that TCI staff exacerbated the injuries by unreasonably requiring him to wear the "black box," continuing his assigned work duties, or failing to accommodate his injuries in the cafeteria or with regard to his hygiene. But ultimately, the essence of the claims is that petitioners negligently failed to diagnose and care for his injuries.

California law, which indisputably applies to this case, provides ample remedies for these kinds of allegations. It provides that "[e]veryone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned by his or her want of ordinary care or skill in the management of his or her property or person." Cal. Civ. Code § 1714. This means, "as a general rule, persons have a duty to use due care to avoid injury to others, and may be held liable if their careless conduct injures another person." *Knight* v. *Jewett*, 834 P.2d 696, 708 (Cal. 1992). As to medical negligence specifically, the Civil Code provides that health care providers are liable "for the failure to inform of the risks of treatment or failure to accept treatment, or for negligent diagnosis or treatment or the negligent failure to diagnose or treat." Cal. Civ. Code § 1714.8.

The duties owed by custodians of others, including prison personnel, are even more stringent. California law recognizes Section 314A of the Restatement (Second) of Torts, which states that "[o]ne who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other." *See* Pet. App. 43a; *Delgado* v. *Trax Bar & Grill*, 113 P.3d 1159, 1165 n.14 (Cal. 2005) (citing Section 314A with approval); *Melton* v. *Boustred*, 107 Cal. Rptr. 3d 481, 490 (Cal. Ct. App. 2010) (same).

This general duty applies specifically to jailers. In California, "there is a special relationship between jailer and prisoner, imposing on the former a duty of care to the latter." *Giraldo* v. *Cal. Dep't of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371, 385 (Cal. Ct. App. 2008). The duty arises because prisoners are

"vulnerable" and "dependent," and because the relationship between jailer and prisoner "is protective by nature, such that the jailer has control over the prisoner, who is deprived of the normal opportunity to protect himself from harm inflicted by others." *Id.* at 386. The duty is broad: "jailers owe prisoners a duty of care to protect them from foreseeable harm." *Id.* at 387.

This duty, moreover, applies to private companies operating detention facilities in California, which have a specific obligation "to protect [detainees] from harm by obtaining needed medical care." *Lawson* v. *Superior Ct.*, 103 Cal. Rptr. 3d 834, 849-50 (Cal. Ct. App. 2010) (claim against, *inter alia*, employees of private company operating community correctional facility). Even when they contract with the State, neither the private companies nor their employees are cloaked with governmental immunities. *Id.* at 856-58.

To the extent they could ever have been proven, Pollard's factual allegations would have found remedies under these provisions, because he could have proved injury resulting either from negligence or a breach of the even broader duty to protect him from foreseeable harm. But again, whether he would have recovered under California law is not the question here. The question is whether his allegations would state a claim under the Eighth Amendment but *not* under California law, thereby rendering state law an inadequate alternative to a *Bivens* claim. As in *Malesko*, the answer to that question is plainly "no."

2. In *Malesko*, the Court noted that the allegations in that case—that the plaintiff, who had a known heart condition, was forced to climb stairs leading to a heart attack—appeared to be "a

quintessential claim of negligence." 534 U.S. at 73. Such a claim, the Court held, was more than an adequate alternative to a *Bivens* claim under the Eighth Amendment, "because the heightened 'deliberate indifference' standard of Eighth Amendment liability would make it considerably more difficult for respondent to prevail than on a theory of ordinary negligence." *Id.* (citations omitted).

The same is true here. Pollard's ordinary tort remedies are "actually superior to any presumed action he would have under *Bivens*." Pet. App. 10a (Bea, J., dissenting); *id.* at 56a-58a (Restani, J., dissenting) Under the federal standard, Pollard would have the burden to prove that the defendants showed "deliberate indifference to serious medical needs" that "constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." *Estelle*, 429 U.S. at 104 (citation omitted). *See Ingraham* v. *Wright*, 430 U.S. 651, 670 (1977) ("[T]he unnecessary and wanton infliction of pain * * * constitutes cruel and unusual punishment forbidden by the Eighth Amendment."); *Hudson* v. *McMillian*, 503 U.S. 1, 6-7 (1992) ("Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.'").

As this Court has noted, "deliberate indifference describes a state of mind more blameworthy than negligence." *Farmer* v. *Brennan*, 511 U.S. 825, 835 (1994). *See also Whitley* v. *Albers*, 475 U.S. 312, 322 (1986) (emphasizing "the distinction between mere negligence and wanton conduct that we find implicit in the Eighth Amendment"). Accordingly, there is no credible argument that Pollard's claims of negligent

diagnosis and follow-up care of his injuries would state a claim under the *scienter*-based Eighth Amendment standard but would have failed to state a claim under state law. Indeed, the affirmative duty that California jailers owe their prisoners—to protect them from foreseeable harm—is even *more* protective than a simple negligence standard.

To the extent Pollard might recharacterize his "black box" allegations as claims of excessive force, they would fare even worse under the Eighth Amendment. He would have to show much more than negligence or the elements of common law assault and battery: He would have to show that force was not "applied in a good faith effort to maintain or restore discipline," but was applied "maliciously and sadistically to cause harm." *Hudson*, 503 U.S. at 7. As is obvious, "[m]ere negligence" is insufficient to satisfy that onerous burden. *Wilson* v. *Seiter*, 501 U.S. 294, 305 (1991).

Finally, "the tort of negligence" covers Pollard's claims that he could not feed or bathe himself while his arms were in casts. Pet. App. 66a-67a (Restani, J., dissenting) (citing cases). Pollard does not allege he was deliberately deprived of food or hygiene as a punishment, but rather that prison employees unreasonably failed to care for his injuries by, for example, providing an alternative to a cafeteria tray.[5] To the

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[5] These allegations are dubious on their face. Pollard does not allege that he ever asked anyone to hold his tray or bring food to his cell, but rather that he elected to "avoid going to the food service to eat" and instead to purchase his own food, because he did not want to be "humiliated." JA35. And he does not allege that his inability to bathe after the surgery was any different than would be faced by anyone wearing casts after such a procedure.

extent these allegations involve either negligent conduct or foreseeable harm, California law would have provided a putative remedy. By contrast, under the federal Constitution, "[b]ecause routine discomfort is part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation." *Hudson*, 503 U.S. at 6-7 (citations and quotations omitted).

Moreover, Pollard would lack a *Bivens* remedy for any allegation of wrongdoing that did not cause physical injury to him. In the Prisoner Litigation Reform Act ("PLRA"), Congress provided that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). The PLRA covers *Bivens* actions. *See, e.g.*, *Alexander* v. *Hawk*, 159 F.3d 1321 (11th Cir. 1998); *Whitley* v. *Hunt*, 158 F.3d 882 (5th Cir. 1998); *Garrett* v. *Hawk*, 127 F.3d 1263 (10th Cir. 1997); *see also Geiger* v. *Jowers*, 404 F.3d 371, 375 (5th Cir. 2005) ("Section 1997e(e) applies to all federal civil actions in which a prisoner alleges a constitutional violation * * * absent physical injury"); Robin Miller, Annotation, *Rights of Prisoners in Private Prisons*, 119 A.L.R.5th 1, § 12 (2004 & Supp.) (citing other cases). Thus, to the extent Pollard alleges discomfort without any actual physical injury, he would lack any *Bivens* claim at all. By contrast, state law actions in California state court are not so limited. *See Molien* v. *Kaiser Found. Hospitals*, 616 P.2d 813, 819-21 (Cal. 1980).

Finally, Pollard's state law remedies were superior to a *Bivens* remedy in another important respect. *Bivens* claims are not subject to *respondeat superior* liability. *See Iqbal*, 129 S. Ct. at 1948. But under California law, a prisoner in a privately-managed facility will generally be able to seek vicarious liability against the contractor under *respondeat superior*. *See, e.g.*, *Lawson*, 103 Cal. Rptr. 3d at 854-58 (claim brought against both company and employees). Thus, just as in *Malesko* and unlike under *Bivens*, prisoners like Pollard would have the ability to sue both the individual employees and the company in tort. Indeed, a claimant would ordinarily prefer a state tort suit against the company given the greater certainty of recovery. *Cf. Malesko*, 534 U.S. at 71 ("if a corporate defendant is available for suit, claimants will focus their collection efforts on it"); *id.* at 80-81 (Stevens, J., dissenting) ("It cannot be seriously maintained * * * that tort remedies against corporate employers have less deterrent value than actions against their employees.").

Thus, Pollard's available state law remedies for the physical harms he alleges were not only adequate alternatives, but were in fact superior, to any putative *Bivens* remedy. There is no instance in which Pollard could prevail only on a *Bivens* claim but not a state law claim for the same injury.

3. The Ninth Circuit majority did not deny that Pollard had adequate state law remedies. Instead, the court thought a blanket *Bivens* remedy justified based in part on speculation that other plaintiffs in other hypothetical cases might lack such remedies, and that courts might have difficulty determining adequacy of remedies in other cases. *See* Pet. App. 42a (determining adequacy of remedies "would likely

be difficult to administer"); *id.* at 43a-44a (speculating on lack of state law remedy for denial of "access to a toilet," "outdoor exercise," "socks, toilet paper, and soap" or "low cell temperature at night combined with a failure to issue blankets") (citations omitted).

These concerns, even if valid, could not justify creation of a *Bivens* remedy in *this* case. As the dissent noted, this Court prefers "case-by-case determinations of whether adequate alternative remedies exist to a blanket determination that *Bivens* is available to an entire class of plaintiffs." *Id.* at 64a (Restani, J., dissenting). The Court decides cases on the facts before it, not on the facts of hypothetical cases. *See Alabama State Fed. of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945) (it is the Court's "considered practice" not to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, * * * or to decide any constitutional question except with reference to the particular facts to which it is to be applied"). That was evident in *Wilkie*, where the Court declined to infer a *Bivens* remedy in circumstances unlikely ever to be repeated, based on the specific and unusual facts of that dispute.

Thus, in the unlikely event a future claimant in a future case believes that state law is an inadequate alternative to a *Bivens* claim under the Eighth Amendment, either for procedural or substantive reasons, he can try to make that showing. Invocation of *Bivens* involves "the kind of remedial determination that is appropriate for a common-law tribunal," *Wilkie*, 551 U.S. at 550 (citation omitted), and courts can thus calibrate the remedy to any unusual facts that may arise. And to the extent any

further problems arise, Congress can always provide whatever remedy it deems fit.

But in any event, the panel majority's concerns are unfounded. Although California law is the only state law implicated by this case, other states similarly provide remedies that are at least equivalent, if not superior, to a *Bivens* remedy under the Eighth Amendment. As the *en banc* dissenters noted, Pollard "has not shown—because he cannot—that there is any state which does not provide recovery for that most fundamental tort claim, in which one person's negligent conduct causes physical and/or emotional harm to another." Pet. App. 11a (Bea, J., dissenting). These remedies include harms negligently inflicted on prisoners, including the failure to provide necessities.[6]

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6 *See* Pet. App. 65a-67a (Restani, J., dissenting) (citing cases from five States); *Giraldo*, 85 Cal. Rptr. 3d at 384 (following cases from 14 other States); *Salazar* v. *Collins*, 255 S.W.3d 191, 200-01 nn. 7-8 (Tex. Ct. App. 2008) (following cases from 33 States and Territories); M.L. Schellinger, Annotation, *Civil Liability of Sheriff or Other Officer Charged With Keeping Jail or Prison for Death or Injury to Prisoner*, 14 A.L.R.2d 353, §§ 2(a), 4(a), 7, 8(b), 9(a), 10 (1950 & Supp.) (describing applicable cases from 27 States); Michael S. Vaughn, *Penal Harm Medicine: State Tort Remedies for Delaying and Denying Health Care to Prisoners*, 31 Crime, Law & Social Change 273, 276-296 (1999) (describing applicable medical negligence cases from 18 States); *see also Joseph* v. *State*, 26 P.3d 459, 466-67 (Alaska 2001); *Toombs* v. *Bell*, 915 F.2d 345, 349 (8th Cir. 1990) (Arkansas law); *Wormley* v. *United States*, 601 F. Supp. 2d 27, 44-45 (D.D.C. 2009) (D.C. law); *District of Columbia* v. *Mitchell*, 533 A.2d 629, 639, 645, 648 (D.C. 1987); *Gaither* v. *District of Columbia*, 333 A.2d 57, 60 (D.C. 1975); *Hall* v. *Knipp*, 982 So. 2d 1196, 1198 (Fla. Dist. Ct. App. 2008); *Alba*, 517 F.3d at 1254-56 (Georgia law); *Upchurch* v. *State*, 454 P.2d 112, 114-15 (Haw. 1969); *Trout* v. *Buie*, 653 N.E.2d 1002, 1008 (Ind. Ct. App. 1995); *Heumphreus* v. *State*, 334 N.W.2d 757, 759 (Iowa

There is no reason to believe—and the Ninth Circuit majority cited no authority for the proposition—that state laws would provide no remedy in other cases alleging denial of items like socks, toilet facilities, soap or blankets. *See* Pet. App. 65a-67a (Restani, J., dissenting) (citing cases). But the PLRA almost certainly precludes a *Bivens* remedy in such cases, unless these claims could somehow be considered to allege "physical harm." 42 U.S.C. § 1997e(e). The majority's principal concern was that state tort law might not apply where a claim does *not* "amount to 'physical harm.'" Pet. App. 43a (quoting Restatement (Second) of Torts § 314A(1)(a), (4)). *But see, e.g.*, *Molien*, 616 P.2d at 819-21. But the PLRA expressly *bars* prisoners from asserting such *Bivens* claims.

Instead, an affected prisoner would have the usual and appropriate remedy if such deprivations amount to a violation of the Eighth Amendment—injunctive

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1983); *Peoples*, 422 F.3d at 1103-05 (Kansas law); *Estate of Sisk* v. *Manzanares*, 262 F. Supp. 2d 1162, 1185-86 (D. Kan. 2002) (same); *Washington* v. *State*, 839 P.2d 555 (Kan. Ct. App. 1992); *C.J.W.* v. *State*, 853 P.2d 4, 8-9 (Kan. 1993); *Williams* v. *O'Brien*, 936 N.E.2d 1, 6 (Mass. 2010); *Thornton* v. *City of Flint*, 197 N.W.2d 485, 493 (Mich. 1972); *Thomsen* v. *Ross*, 368 F. Supp. 2d 961, 978 (D. Minn. 2005); *Scott-Neal ex rel. Scott* v. *New Jersey State Dep't of Corr.*, 841 A.2d 957, 961 (N.J. Super. Ct. App. 2004); *Marchione* v. *State*, 598 N.Y.S.2d 592, 594-595 (N.Y. App. Div. 1993); *Holly*, 434 F.3d at 296 (North Carolina law); *Multiple Claimants* v. *North Carolina Dep't of Health & Human Servs.*, 626 S.E.2d 666, 673 (N.C. Ct. App. 2006); *Bell* v. *Ohio Dep't of Rehab. & Corr.*, 810 N.E.2d 467, 470 (Ohio Ct. Cl. 2004); *Sloan* v. *Ohio Dep't of Rehab. & Corr.*, 695 N.E.2d 298, 300 (Ohio Ct. App. 1997); *Gregoire* v. *City of Oak Harbor*, 244 P.3d 924, 927 (Wash. 2010) (*en banc*); *Shea* v. *City of Spokane*, 562 P.2d 264, 267 (Wash. Ct. App. 1977), *aff'd* 578 P.2d 42 (Wash. 1978).

relief to compel provision of necessities. As noted in *Malesko*, "unlike the *Bivens* remedy, which we have never considered a proper vehicle for altering an entity's policy, injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." 534 U.S. at 74. *Bivens* is concerned only with *damages*; a court's power to award injunctive relief has express statutory authorization, 28 U.S.C. § 1651, and is unaffected by the absence of a *Bivens* remedy. Thus, denial of a *Bivens* remedy in this case will not affect the ability of federal courts to rectify any ongoing Eighth Amendment violations. *Compare Brown* v. *Plata*, 131 S. Ct. 1910 (2011) (injunctive relief under PLRA to remedy severe overcrowding in state prison system).

Nor is there any warrant to infer a blanket *Bivens* remedy for an entire class of plaintiffs based on speculation that the adequacy of alternative remedies could be hard to determine in some other hypothetical case. The Ninth Circuit majority worried that courts would have to consider multiple sources of state law, including possible defenses. Pet. App. 44a-45a. But where, as in this case, creation of a *Bivens* right of action is unwarranted because adequate alternatives plainly exist, there is no license to nonetheless exercise that extraordinary power based on speculation about the ease with which the issue might be determined in some future case.

Regardless, the Ninth Circuit majority underestimated the ability of courts to manage and resolve legal issues. In *Wilkie*, for example, this Court examined multiple sources of state and federal law and, although it found the adequacy-of-remedies issue somewhat difficult, 551 U.S. at 553-54, was still able

to resolve the case. Courts are commonly called upon to determine the adequacy of alternative state and federal remedies, including in the prison context.[7] And other circuits have had no difficulty doing so in this specific context as well. *See Alba*, 517 F.3d at 1254-65; *Holly*, 434 F.3d at 296; *Peoples*, 422 F.3d at 1103-05. There is no reason why courts cannot continue to do so, in the unlikely event a plaintiff has reason to think that a state law remedy is an inadequate alternative to a *Bivens* claim.

III. PETITIONERS' STATUS AS PRIVATE EMPLOYEES GIVES RISE TO FACTORS COUNSELING HESITATION.

Just as in *Malesko*, Pollard's adequate alternative remedies are themselves sufficient reason to decline to recognize a *Bivens* remedy. But this case also involves factors counseling hesitation, stemming from the fact that, at the time of the events at issue, petitioners were not federal officials but were instead employees of a private government contractor. As such, they lack the recognized immunities of their governmental counterparts, resulting in asymmetrical liability risks and eliminating a principal rationale for recognition of the *Bivens* doctrine in the first place. And whereas Congress has indicated its clear intent to preserve *Bivens* claims for actual

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[7] *See, e.g., Nat'l Private Truck Council* v. *Okla. Tax Comm'n*, 515 U.S. 582, 588 (1995) (federal court "may not award damages or declaratory or injunctive relief in state tax cases when an adequate state remedy exists"); *Parratt* v. *Taylor*, 451 U.S. 527 (1981) (prisoner not denied due process where state provided adequate post-deprivation remedy); *Younger* v. *Harris*, 401 U.S. 37, 43-44 (1971) (noting the "basic doctrine of equity jurisprudence that courts of equity should not act * * * when the moving party has an adequate remedy at law").

governmental employees while pre-empting all other tort claims against them, Congress has expressed the opposite intent for employees of private contractors like petitioners. Whether considered separately or together with Pollard's adequate alternative remedies, these factors, at a minimum, counsel hesitation. *See Arar*, 585 F.3d at 574 ("'Hesitation' is 'counseled' whenever thoughtful discretion would pause even to consider."). The proper resolution, then, is to leave the matter to the policy judgment of Congress.[8]

A. Petitioners Lack The Recognized Immunities Of Their Governmental Counterparts.

In *Malesko*, the Court held that because a *Bivens* remedy would "impose asymmetrical liability costs," whether to fashion such a right of action "is a question for Congress, not us, to decide." 534 U.S. at 72. The same is true here. Because employees of private contractors such as petitioners lack the recognized immunities of their governmental counterparts, recognition of a *Bivens* action would

[8] This is not a case arising under 42 U.S.C. § 1983, which requires a determination of whether a defendant acts "under color of state law." *See, e.g., West* v. *Atkins*, 487 U.S. 42, 43 (1988) (applying statutory language to claims against doctor employed by state prison as independent contractor). Nor does it require a determination of whether employees of private prison operators exercise governmental powers as a general matter. There is a plausible basis to hold that such employees do not exercise purely public functions, *see Holly*, 434 F.3d at 293-94, but the issue here is that petitioners are not government employees subject to suit under the criteria specifically designed by the Court for *Bivens* claims. As in *Malesko* and every other case where the Court has declined to extend *Bivens*, a *Bivens* remedy is inappropriate here regardless of whether private prison employees might be viewed as acting under color of law for other purposes.

create asymmetrical liabilities. As in *Malesko*, therefore, whether to create such an unbalanced remedial scheme is a policy question for Congress, not this Court, to resolve.

In *Richardson* v. *McKnight*, 521 U.S. 399 (1997), this Court held that employees of private prison management firms that contract with state and local governments have no qualified immunity from constitutional claims brought under 42 U.S.C. § 1983. The Court so held because "[h]istory does not reveal a 'firmly rooted' tradition of immunity applicable to privately employed prison guards," given that "correctional functions have never been exclusively public." 521 U.S. at 404-05. Thus, qualified immunity did not apply to employees of "a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, [which] undertakes that task for profit and potentially in competition with other firms." *Id.* at 413. And in *Butz*, 438 U.S. at 504, the Court held that "without congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials."

Under these holdings, if petitioners were subjected to *Bivens* claims, that would not arm them with the recognized qualified immunity defense enjoyed by their federal employee counterparts. Qualified immunity "permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time-consuming preparation to defend the suit on its merits." *Siegert* v. *Gilley*,

500 U.S. 226, 232 (1991). Its purpose "is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Id.* Thus, in *Carlson*, the Court found no factor counseling hesitation because "even if requiring [petitioners] to defend respondent's suit might inhibit their efforts to perform their official duties, * * * qualified immunity * * * provides adequate protection." *Carlson*, 446 U.S. at 19.

The opposite result should obtain here, given that the "adequate protection" of a recognized immunity defense is absent. As the Ninth Circuit noted, the result of its rule is that prisoners asserting *Bivens* claims against employees of private prison contractors "may be able to recover more often than their counterparts in governmentally run prisons." Pet. App. 51a. The majority found that acceptable on the ground that other "asymmetries will persist" if no *Bivens* remedy is inferred. *Id.* at 52a. In fact, the only asymmetry in the absence of a *Bivens* remedy will be that prisoners like Pollard will have *superior* tort remedies against individual tortfeasors as compared to prisoners in governmentally-managed facilities. If a *Bivens* remedy is also added, those remedies will be multiplied to include a superior constitutional remedy that *Carlson* implicitly found would be problematic. Authorizing such liability "is a question for Congress, not [this Court], to decide." *Malesko*, 534 U.S. at 72. *See Holly*, 434 F.3d at 294 ("In the absence of statutory authority, we are reluctant to create an anomaly whereby private defendants face greater constitutional liability than public officials.").

These concerns also show that a key predicate for application of the *Bivens* doctrine is absent from this case. Contrary to the Ninth Circuit's view, there is nothing unusual about state law governing tort claims against even actual Federal government employees who exceed their constitutional authority. Before *Bivens*, state law was the normal way to obtain redress for such torts. *See Butz*, 438 U.S. at 489-91; *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 409 F.2d 718, 721-22 (2nd Cir. 1969), *rev'd*, 403 U.S. 388 (1971). In such cases, claims that an officer exceeded constitutional authority arose to rebut the officer's immunity defense that the actions were "authorized by the national government." *Id.* at 721. When the federal officer sought to cloak himself in the government's immunity to avoid tort liability, the plaintiff would respond that such immunity was improper because the officer had exceeded his authority under the Constitution. *Butz*, 438 U.S. at 490-91.

In *Bivens*, this Court found this traditional model inadequate because of gaps in the state law of trespass. It therefore created, in the circumstances of that case, a special "cause of action for damages against a *federal official*." *Bush*, 462 U.S. at 374 (emphasis added). *See Malesko*, 534 U.S. at 70 (purpose of *Bivens* is "to deter individual *federal officers* from committing constitutional violations") (emphasis added). Similarly, in the Westfall Act of 1988, Congress foreclosed reliance on all state law claims against "any employee of the Government," 28 U.S.C. § 2679(b)(1), making a federal constitutional remedy more necessary for such claims. But the traditional state law model retains full validity in cases like this one, where the individual defendants have

no recognized immunity defenses to invoke and are not government employees covered by the FTCA. *Cf. Meyer*, 510 U.S. at 485 ("*Bivens* clearly contemplated that official immunity would be raised"). That this case does not raise the concerns that prompted development of the *Bivens* doctrine in the first place is yet another factor counseling hesitation.

B. Congress Has Expressly Exempted Private Contractors From The FTCA.

This Court has recognized that the "'special factors counseling hesitation in the absence of affirmative action by Congress'" includes "an appropriate judicial deference to indications that congressional inaction has not been inadvertent." *Schweiker*, 487 U.S. at 423. That deference is warranted here. Whereas Congress has expressed its intent to preserve *Bivens* claims against actual government employees while pre-empting ordinary tort claims against them, it has expressed the opposite intent with respect to employees of government contractors like petitioners.

As noted, in *Carlson* the Court held that Congress had expressed a "crystal clear" intent that the FTCA and *Bivens* remain as parallel, complementary remedies against government employees. 446 U.S. at 19-20. In the Westfall Act, that intent only became clearer. Presently, the FTCA remedy "against the United States" resulting from the "negligent or wrongful act or omission of any *employee of the Government*" acting within the scope of employment is "exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against *the employee*" and "[a]ny other civil action or proceeding for money damages arising out of or relating to the same subject matter *against the employee* * * * is precluded." 28 U.S.C. §

2679(b)(1) (emphasis added). However, that exclusivity "does not extend or apply to a civil action against an *employee of the Government* * * * which is brought for a violation of the Constitution of the United States." *Id.* § 2679(b)(2) (emphasis added). As this Court has noted, § 2679(b)(2) is an "explicit exception for *Bivens* claims." *Hui*, 130 S. Ct. at 1851.

Congress, however, made a deliberate decision *not* to include any employees of government contractors within this remedial scheme. Congress has expressly provided that the term "Federal agency" as used in the FTCA "*does not include any contractor with the United States*" and that the term "Employee of the government" includes only "employees of any federal agency," members of the military or National Guard and persons acting "on behalf of a federal agency in an official capacity." 28 U.S.C. § 2671 (emphasis added). Thus, when Pollard attempted to assert an FTCA claim against the United States for the allegations at issue here, that claim was rejected on the ground that the FTCA does not cover claims against employees of contractors like GEO. *See* Mot. for Summ. Judg. at 7 (filed Oct. 18, 2006) (FTCA claim denied because "[t]he term "federal agency" does not include any contractor with the United States. Therefore, acts or omissions allegedly committed by contract staff at the Taft Correctional Institution cannot be considered under the provisions of the Federal Tort Claims Act.") (Dkt. 18).

This exclusion was broad and intentional. In *Logue* v. *United States*, 412 U.S. 512 (1973), which also involved a prisoner's claims of tortious conduct by employees of a federal prison contractor, the Court noted that Congress could have left the determination whether the United States should be

liable for the negligence of contractors to state agency law. But Congress "chose not to do this, and instead incorporated into the definitions of the Act the exemption from liability for injury caused by employees of a contractor." *Id.* at 528.

When it wants to, Congress knows how to prescribe liability for private parties acting "under color" of federal law, similar to what it has done in 42 U.S.C. § 1983 for those acting under color of state and local law. *See, e.g.*, 18 U.S.C. § 242 (imposing criminal liability for deprivations of constitutional rights committed "under color of any law"). In the FTCA, however, Congress made the deliberate decision *not* to include employees of government contractors in the same remedial scheme it constructed for employees of the government. For government employees, Congress (1) pre-empted all state tort claims against them and replaced those claims with an FTCA remedy against the United States that *Carlson* found an inadequate substitute to *Bivens*, while (2) expressly preserving *Bivens* claims against those individuals. But for people like petitioners, it did the opposite. State tort claims against them (and their employers) are not pre-empted and the "crystal clear" intent to preserve *Bivens* that was determinative in *Carlson*—and that became even clearer after the Westfall Act—is lacking as to them.

At a bare minimum, this disparate Congressional intent as between employees of government contractors and employees of the government is a factor counseling hesitation. There is no need to employ the Court's extraordinary powers to create a new private right of action, because traditional remedies exist that are more than adequate to compensate and

deter. And there is no express intent by Congress to preserve any additional *Bivens* remedies.

C. The Court Should Leave The Creation Of A New Federal Remedy To The Policy Judgment Of Congress.

Given these multiple causes for hesitation, the Court should leave these issues for Congress, which "is in a far better position than a court to evaluate the impact of a new species of litigation' against those who act on the public's behalf." *Wilkie*, 551 U.S. at 562 (quoting *Bush*, 462 U.S. at 389). For "Congress can tailor any remedy to the problem perceived," *id.*, has "developed considerable familiarity with balancing governmental efficiency and the rights of employees," and "may inform itself through factfinding procedures such as hearings that are not available to the courts." *Bush*, 462 U.S. at 389.

What the Court should not do is to take it upon itself to provide the kind of asymmetrical federal right of action against employees of contractors that Congress has elected not to provide. Such a ruling would potentially increase the government's costs of contracting as contractors (not just in the prison context) pass along litigation costs incurred in defending and indemnifying their employees. *Cf. Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 511-12 (1988). In *Meyer*, the Court declined to recognize a new category of *Bivens* claims that "would be creating a potentially enormous financial burden for the Federal Government," because "decisions involving 'federal fiscal policy' are not ours to make." 510 U.S. at 486 (citation omitted). The same is true here.

Moreover, the new blanket remedy that Pollard seeks would also result in an increase in federal

court litigation nationwide. *See Wilkie*, 551 U.S. at 562 (noting potential for an "onslaught of *Bivens* actions"); *Bivens*, 403 U.S. at 430 (Blackmun, J., dissenting) (Court's "judicial legislation * * * opens the door for another avalanche of new federal cases"). As noted in the petition, both prisoner *Bivens* claims and the percentage of federal prisoners housed in privately managed facilities are on the rise. *See* Pet. 28-29. Absent a new *Bivens* remedy, the normal forum for claims like Pollard's would be state court, unless diversity of citizenship could be shown.[9] But if the Court accepts the invitation to create a new blanket federal damages remedy, that would only increase the trend toward federalization of prisoner litigation involving allegations of ordinary negligence. That, as well, is a matter for Congress to consider. If anything, Congress's action in enacting the PLRA indicates that it is seeking to curtail, rather than expand, prisoner litigation in federal courts.

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[9] This is unlike the normal *Bivens* claim, which is often combined with an FTCA claim for which federal jurisdiction already exists. *See, e.g.*, *Hui*, 135 S. Ct. at 1848.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

RECORD
AND

No. 10-1104

IN THE

Supreme Court of the United States

MARGARET MINNECI, *et al.*,
Petitioners,

v.

RICHARD LEE POLLARD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether a federal inmate is barred from bringing a damages action for a violation of his Eighth Amendment rights because the federal actors who committed the violation were employed by a private prison operating under contract with the federal government.

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INTRODUCTION

Richard Lee Pollard is a federal prisoner whose federal constitutional rights were violated by persons acting under color of federal law. To remedy these harms, Pollard asserts a federal cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Petitioners would have Pollard rely instead on a state cause of action the existence of which is doubtful at best. Given federal prisoners' longstanding access to constitutional damages under *Carlson v. Green*, 446 U.S. 14 (1980), and the uncertain availability of state remedies, a federal cause of action is appropriate.

STATEMENT OF THE CASE

1. In July 1997, the Federal Bureau of Prisons (BOP) hired Wackenhut Corrections Corporation, now known as The Geo Group, to operate a federal prison in Taft, California. The BOP transferred Richard Lee Pollard into that prison in March 2001 from a BOP-operated facility and then, in November 2002, transferred him out to another BOP-operated facility. Pollard's claims arise from his 20-month stay in the privately run Taft facility.

On April 7, 2001, while working in the prison kitchen, Pollard fell and fractured both his elbows. After this accident, he sought medical assistance from the prison infirmary, which provided him with pain medication and bandages. JA31. Two days later, when the pain had not abated, Pollard visited the infirmary again, and an X-ray revealed a possible fracture in each elbow. Prison staff then made an appointment for Pollard to visit an orthopedist at a clinic outside the prison. JA31. During the next several months, Pollard suffered four different Eighth Amendment violations at the hands of five different

Geo Group employees, all of whom were Defendants below and are Petitioners here.

The first violation concerned Pollard's transport to the orthopedist. Bob D. Stiefer was the Chief of Security at Taft and was responsible for prisoner transport. JA29. When Pollard was summoned for his trip to the orthopedist, Stiefer ordered Pollard, who was in obvious pain and posed no security threat, to take off his bandages and sling and put on a jumpsuit. JA31. Given Pollard's inability to bend his arms at the elbow, putting on the jumpsuit caused him "the most excruciating pain." JA32. After ordering him to put on the jumpsuit, Stiefer also ordered Pollard to wear a "black box," a handcuff-like device attached to a chain around an inmate's waist. The weight and positioning of the device put downward pressure on Pollard's arms for six-and-a-half hours, causing him tremendous and unnecessary pain. JA32. Several weeks later, Stiefer ordered Pollard a second time to wear the black box for transport to another appointment. JA37. Pollard again suffered extraordinary pain. JA37.

Pollard suffered his second Eighth Amendment violation at the hands of Jonathan E. Akanno and Robert Spack, both physicians then working for The Geo Group. JA29. Akanno deliberately ignored Pollard's serious medical needs by refusing to provide medical care recommended by the outside orthopedist, including placing Pollard's arm in a splint and providing him with physical therapy. JA33, 40, 42. The refusal to provide such basic medical care caused Pollard significant and long-lasting pain. Spack violated Pollard's Eighth Amendment rights by ignoring obvious evidence of discoloration and significant swelling in Pollard's hands. This reckless behavior forced Pol-

lard to go without basic treatment and suffer extended pain. JA40-41.

Becky Maness, a Food Services supervisor at Taft, also violated Pollard's Eighth Amendment rights. JA29. After Pollard's injury, but long before his arms had healed, Maness forced Pollard to work on various kitchen tasks that caused great pain to his arms. JA35-36. Maness knew of Pollard's injury and painful condition but nonetheless forced Pollard to perform the tasks, even after Pollard's protestations. JA35, 36. After several days of this painful and unnecessary work, Pollard finally was able to visit a prison physician, who declared him unfit to work for the next two weeks. JA36.

Margaret Minneci violated Pollard's Eighth Amendment rights by ignoring Pollard's basic need for food and hygiene. Minneci was Pollard's Health Services Administrator and as such was responsible for overseeing his medical needs. JA28-29. During a portion of his treatment, both of Pollard's arms were placed in casts from his wrists to above his elbows. Because of the casts, Pollard was unable to participate in regular meals or clean himself in the shower or toilet. Minneci had a constitutional responsibility to address Pollard's basic needs and yet made no attempt to intervene. JA33.

2. Based on these events, Pollard filed suit *pro se* in the United States District Court for the Eastern District of California on August 21, 2001. JA13. He amended his complaint on April 18, 2002. JA15. On September 12, 2006, a Magistrate Judge recommended that the action be dismissed because Pollard had no cause of action under *Bivens* and its progeny. JA16. Without analyzing or citing any California

case law, the Magistrate Judge found the cause of action barred on the ground that Pollard had "alternative and superior remedies available to him in state court." Pet. App. 79a. On June 7, 2007, the District Court "adopted in full" the Magistrate Judge's recommendation of dismissal. Pet. App. 71a. Pollard, now represented by counsel, timely appealed the decision to the Court of Appeals for the Ninth Circuit. JA17-18.

The Ninth Circuit reversed. The court held that Petitioners acted under color of federal law (a holding uncontested before this Court) and were suable in a *Bivens* action. Petitioners sought rehearing en banc, which the Ninth Circuit refused, JA10-11, and then petitioned this Court for a writ of certiorari, which this Court granted. JA12.

SUMMARY OF ARGUMENT

To remedy the constitutional violations he suffered at the hands of persons acting under color of federal law, Pollard asserts an implied right of action of the type recognized by this Court in *Bivens*, and in a setting where this Court has repeatedly applied *Bivens*: claims of Eighth Amendment violations at a federal prison. Petitioners insist that Pollard has no claim for the violation of his constitutional rights and should instead be limited to whatever rights he may have under state common law. A federal cause of action is appropriate for either of two reasons.

First, in *Carlson v. Green,* this Court held that a federal prisoner may bring a *Bivens* action for Eighth Amendment violations against prison personnel acting under color of federal law. The cause of action alleged here is, in every meaningful sense, the same as that approved in *Carlson*. This Court has never

drawn a line in its *Bivens* cases between privately employed persons acting under color of federal law and publicly employed persons acting under color of federal law. Were it to do so, privately held federal prisoners would be the only prisoners in the country, whether federal or state, prohibited from enforcing their constitutional rights through a damages action. The Court rejected such asymmetry in *Correctional Services Corporation v. Malesko*, 534 U.S. 61, 72 (2001), where it explained that, in the private prison setting, "a *Bivens* claim against the offending individual officer" is an appropriate remedy. The force of *Carlson* and *Malesko* is unaffected by Petitioners' lack of qualified immunity. As this Court has stated before, "the question of official immunity from *Bivens* liability" is "analytically distinct" from the "the *Bivens* inquiry." *United States v. Stanley*, 483 U.S 669, 684 (1987).

Second, a federal cause of action is appropriate for prisoners in Pollard's shoes. When this Court approves or disapproves a *Bivens* action, it does so for an entire "context" or "category of defendants." *Malesko*, 534 U.S. at 68. The context and the category of defendants implicated here—Eighth Amendment damages actions brought against individuals acting under color of federal law—are appropriate for a *Bivens* action. Privately held federal prisoners have no alternative federal remedies, and the availability and adequacy of state remedies are conjectural. Moreover, there are no "special factors" here to preclude the action. *Bivens* actions are routinely used to enforce Eighth Amendment rights, a point not lost on Congress when it specifically approved such actions in 1988. *See* 28 U.S.C. § 2679(b). Finally, permitting *Bivens* actions here will have no appreciable effect on

the volume of federal court litigation or the costs imposed on the federal government.

ARGUMENT

I. A FEDERAL INMATE WHOSE EIGHTH AMENDMENT RIGHTS HAVE BEEN VIOLATED MAY BRING A CONSTITUTIONAL DAMAGES ACTION.

In *Bivens*, this Court held that a federal agent's violation of the Fourth Amendment "gives rise to a cause of action for damages consequent upon his unconstitutional conduct." 403 U.S. at 389. Nine years later in *Carlson v. Green*, 446 U.S. 14 (1980), this Court applied *Bivens*' core holding to claims brought by federal prisoners under the Eighth Amendment against individual prison employees. Pollard has a cause of action here because his suit is, in every meaningful sense, the same as the suit recognized in *Carlson*.

A. *Carlson v. Green* Authorizes the Cause of Action Alleged Here.

In *Carlson*, the survivor of a deceased federal prisoner brought a damages action against the prison employees responsible for the death. As a federal prisoner, the decedent was unquestionably entitled to the protections of the Eighth Amendment. Similarly, as actors under color of federal law, the defendants were unquestionably obligated to obey the Eighth Amendment. Thus, the only question before the Court was whether a damages action was available to federal prisoners deprived of their Eighth Amendment rights. The Court answered in the affirmative, holding that "a remedy [is] available directly under the Constitution" for Eighth Amend-

ment claims. *Id.* at 16. In the years since, the Court has entertained numerous constitutional actions against individual officers based on the Eighth Amendment and never once questioned their availability. *See, e.g., Hui v. Castaneda*, 130 S. Ct. 1845 (2010); *Farmer v. Brennan*, 511 U.S. 825 (1994); *McCarthy v. Madigan*, 503 U.S. 140 (1992). The Court's holding in *Carlson* thus remains firmly established. Indeed, Congress is fully aware of the Court's *Bivens* jurisprudence in the Eighth Amendment context and has signaled no intention to limit its scope. *See* 28 U.S.C. § 2679(b) (preserving damages actions against federal officials "brought for a violation of the Constitution of the United States").

Pollard's case is on all fours with *Carlson*. Like the victim in *Carlson*, Pollard alleges unconstitutional treatment in violation of the Eighth Amendment. Like the victim in *Carlson*, Pollard is a federal prisoner. That is, Pollard was tried, convicted and sentenced by the United States government for a violation of federal law. He was then ordered imprisoned by the federal government at a location of its choosing. And finally, like the defendants in *Carlson*, the defendants here all acted under color of federal law in executing the laws, regulations, and policies of the United States under which Pollard was imprisoned. Their mistreatment of Pollard "was caused, in the sense relevant for [federal] action inquiry, by the [federal government's] exercise of its right to punish [Pollard] by incarceration." *West v. Atkins*, 487 U.S. 42, 55 (1988) (holding physician hired by the state to

treat prisoners was a state actor). Thus, Pollard's suit calls for an ordinary application of *Carlson*.[1]

Were this Court to bar a *Bivens* action here, privately held federal prisoners would be the *only* prisoners in the country unable to enforce their Eighth Amendment rights through a damages action. Prisoners in publicly operated federal facilities can bring damages actions, *Carlson*, 446 U.S. 14, as can prisoners in both publicly and privately operated state facilities. 42 U.S.C. § 1983; *West*, 487 U.S. 42. This asymmetry is even more startling given that federal prisoners are often held side-by-side with state prisoners in privately run facilities.[2] In these circumstances, two prisoners held in the same prison and suffering the same constitutional violation would be forced to resort to entirely different remedial regimes.

---

[1] There is no dispute in this case regarding federal action. Petitioners do not contest that they acted under color of federal law, Pet. Br. 37 n.8, and the United States expressly concedes federal action in this case. U.S. Br. 13-14 n.6.

[2] To take advantage of excess bed capacity at the state and local level, the BOP's Office of the Federal Detention Trustee regularly enters into "Intergovernmental Agreements" whereby state and local level governments hold federal prisoners in exchange for a negotiated payment. Although state and local governments enter into these Agreements, it is often a private prison that actually manages the state or local facility holding the federal prisoner. *See, e.g, County of Bernalillo v. United States*, 93 Fed. Cl. 228, 230-31 (Fed. Cl. 2010) (addressing contract dispute involving Intergovernmental Agreement between BOP and county regarding facility run by private prison company); *Lacedra v. Donald W. Wyatt Det. Facility*, 334 F. Supp. 114, 121 (D.R.I. 2004) (explaining Intergovernmental Agreements in action by federal inmate held in city-owned detention facility managed by private prison company).

Singling out publicly held federal prisoners for different treatment could perhaps be justified if it had any basis in this Court's precedent. But there is none. In its *Bivens* cases, this Court has never distinguished between privately employed persons acting under color of federal law and publicly employed persons acting under color of federal law. In *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001)—the only *Bivens* case the Court has heard involving federal action taken by a private party—the Court's decision did not turn on the defendants' private status.

In *Malesko*, an inmate in a privately run federal halfway house brought a *Bivens* action against Correctional Services Corporation (CSC), the operator of the halfway house, as well as one of its employees. The Court rejected the claim brought against the prison company *not* because it was privately chartered, but because it was an *entity* rather than an individual person. *Id.* at 70-71. This result was predictable in light of *FDIC v. Meyer*, 510 U.S. 471 (1994), another *Bivens* action brought against a federal agency. The Court in *Meyer* rejected a *Bivens* action against the agency because if *Bivens* actions were permitted against federal agencies, "there would be no reason for aggrieved parties to bring damages actions against individual officers" and the "deterrent effects of the *Bivens* remedy would be lost." *Id.* at 485. Seizing on "the logic of *Meyer*," the Court in *Malesko* rejected a *Bivens* action because "if a corporate defendant is available for suit, claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury." 534 U.S. at 71. In so holding, the Court attached *no* significance to the company's private status. Indeed,

it reasoned that the private company was, "in every meaningful sense, the same" as the government agency sued in *Meyer*. *Id.*

Apart from its rejection of the public-private distinction, *Malesko* supports Pollard's cause of action in another way. What is often ignored in *Malesko* is that the plaintiff there brought a *Bivens* claim not only against CSC, but also against one of CSC's employees. When the case came to this Court on the issue of whether CSC was subject to a *Bivens* action, the parties, the United States as amicus curiae, and the Court itself all assumed that a *Bivens* action against the employee would have been proper had it not been barred on statute of limitations grounds. *Id.* at 65.

A central premise of CSC's argument to the Court was that privately held federal prisoners "have no need for a *Bivens* remedy against entities." Brief of CSC at 13, *Malesko*, 534 U.S. 61 (No. 00-860). A *Bivens* action against a prison company is unnecessary, CSC argued, because the plaintiff "could have brought a *Bivens*-type action against CSC's individual employees who allegedly acted unconstitutionally under color of federal law." *Id.* This assertion was not *ipse dixit*; it was based on the "weight of authority" at the time. *Id.* at 13-14 (referring to cases collected in *Heinrich ex rel. Heinrich v. Sweet*, 62 F. Supp. 2d 282, 306-07 (D. Mass. 1999)). According to CSC, this authority made clear that "individual employees of private entities acting under color of federal law are subject to *Bivens* actions." *Id.* at 13.

The United States, participating as amicus curiae in support of CSC, was equally explicit about the availability of a *Bivens* action against private prison

employees. The United States explained in its brief that *Bivens* actions against prison companies were unnecessary because "inmates in private [federal] institutions *already* have remedies, remedies that parallel those available to (and adequate for) their publicly housed counterparts." Brief of United States as Amicus Curiae Supporting Petitioner at 22, *Malesko*, 534 U.S. 61 (No. 00-860) (emphasis added). This statement was not based on the "weight of authority," as was CSC's similar statement, but instead on the "rationales" underlying *Bivens* itself. *Id.* According to the Solicitor General,

> the same rationales that supported the creation of a *Bivens* remedy against federal employees—deterring individuals from engaging in unconstitutional conduct, and ensuring the availability of a remedy separate and apart from state tort law—support the recognition of such a remedy against private individuals who violate constitutional rights under color of federal law.[3]

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[3] In its amicus brief here, the United States tries to paint its position in *Malesko* as nothing more than an "assum[ption] *arguendo* that a *Bivens* remedy would be available against individual employees." U.S. Br. 21 n.9. But the United States hardly could have expected the Court to credit its argument that *Bivens* actions against corporations are unnecessary because "inmates in private [federal] institutions already have remedies" if the United States truly had been agnostic on that issue. Brief of U.S. as Amicus Curiae 22, *Malesko*, 534 U.S. 61 (No. 00-860). Nor would an agnostic feel compelled to argue that the "rationales" behind *Bivens* "support the recognition of [a *Bivens*] remedy against private individuals." *Id.* at 17 n.6. The reality here is that the United States has abandoned its prior stance on

(*Footnote continued*)

Id. at 17 n.6 (internal citation omitted).

In light of the arguments presented to the Court by CSC and the United States as amicus curiae, it is not surprising that the Court *also* believed that *Bivens* actions were available against private prison employees. Writing for the majority, Chief Justice Rehnquist rejected a corporate *Bivens* action in part because "no federal prisoners enjoy" such a remedy. *Malesko*, 534 U.S. at 71-72. Appealing to the value of symmetry, the Chief Justice explained that remedies available to a privately held federal prisoner for a "constitutional deprivation" ought to mimic the remedies available to a publicly held federal prisoner for the same deprivation—namely, "a *Bivens* claim against the offending individual officer." *Id.* at 72. Indeed, the Court faulted the prisoner for not "timely pursu[ing]" a *Bivens* claim against the individual defendants. *Id.*; *see also id.* at 65 (noting the *Bivens* claim against "individual defendants . . . was dismissed on statute of limitations grounds").

In sum, *Malesko* confirms what is plain in *Carlson* itself: A federal prisoner whose Eighth Amendment rights have been violated may bring a constitutional damages action against persons acting under color of federal law.

B. Petitioners' Lack of Qualified Immunity Does Not Preclude a *Bivens* Action.

Despite the holding of *Carlson*, and the assumptions underlying *Malesko*, Petitioners argue that their lack of qualified immunity militates against a

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Bivens cases of this sort and refused to acknowledge, much less explain, its change of course.

Bivens action here. Pet. Br. 36. Petitioners point to the Court's observation in *Carlson* that a damages remedy would not "inhibit [prison guards'] efforts to perform their official duties" because "the qualified immunity accorded [the guards] under *Butz v. Economou*, 438 U.S. 478 (1978), provides them adequate protection." *Carlson*, 446 U.S. at 19. Having no qualified immunity, Petitioners believe a cause of action is unjustified here.[4] What Petitioners fail to acknowledge, however, is that this Court has made clear since *Carlson* that a defendant's immunity, or lack thereof, is "analytically distinct" from a *Bivens* inquiry. *Stanley*, 483 U.S at 684.

In *Stanley*, the Court was asked to determine whether a *Bivens* action should be available in the military context. The Court rejected the action in deference to the unique disciplinary structure of the military. *Id.* at 679. Dissenting, Justice Brennan criticized the Court for, in effect, immunizing federal actors for their constitutional wrongs. *Id.* at 693 (Brennan, J., dissenting). Writing for the Court, Justice Scalia disagreed with Justice Brennan and drew a sharp distinction between causes of action and the affirmative defense of immunity.

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[4] In making this argument, Petitioners cite the "asymmetrical liability risks" it would face if a *Bivens* action were permitted here. Pet. Br. 36. Claims of asymmetry are plainly incorrect in light of private prison companies' routine detention of federal and state prisoners in the same facility. *See supra* 8 n.2. Barring federal prisoners in those facilities from bringing a *Bivens* action will not somehow return prison companies' liability risks to a state of "symmetry." The only effect of such a decision would be to render asymmetrical the constitutional remedies available to federal prisoners.

> [T]he availability of a damages action under the Constitution for particular *injuries* . . . is a question logically distinct from immunity to such an action on the part of particular *defendants*. When liability is asserted under a statute, for example, no one would suggest that whether a cause of action exists should be determined by consulting the scope of common-law immunity enjoyed by actors in the area to which the statute pertains. Rather, one applies that immunity (unless the statute says otherwise) *to* whatever actions and remedies the terms of the statute are found to provide. Similarly, the *Bivens* inquiry . . . is analytically distinct from the question of official immunity from *Bivens* liability.

Id. at 684 (emphasis in original).

Last year, the Court unanimously confirmed *Stanley*'s sharp distinction between causes of action and immunity. In *Hui v. Castaneda*, 130 S. Ct. 1845 (2010), a person detained by U.S. Immigration and Customs Enforcement (ICE) brought a *Bivens* action against physicians who had mistreated him. The physicians were members of the U.S. Public Health Service (PHS), a federal agency charged with caring for ICE detainees. The defendants argued that they were immune from suit under 42 U.S.C. § 233(a), a statute making actions under the Federal Tort Claims Act (FTCA) the "exclusive" remedy for certain harms caused by PHS employees. *Id.* at 1849. The Ninth Circuit saw the issue as whether a *Bivens* action was available for the type of violation at issue and, thus, searched for congressional intent to override the *Bivens* cause of action. Finding no indication

of a congressional override, the court of appeals ruled that the suit could proceed. *Castaneda v. United States*, 546 F.3d 682, 689-99 (9th Cir. 2008).

This Court unanimously reversed. Of particular importance here is how the Court reframed the issue. In the Court's view, a damages action against a federal officer requires "two separate inquiries." *Hui*, 130 S. Ct. at 1851-52 (*citing Stanley*, 483 U.S. at 684). One inquiry—"whether a damages remedy is available for a particular constitutional violation"—is the classic *Bivens* inquiry involving alternative remedies and special factors. *Id.* at 1852. The other inquiry—"whether the agent is amenable to suit"—is a question of immunity. *Id.* Disagreeing with the Ninth Circuit's formulation, the Court held that the case did *not* involve a *Bivens* inquiry. Instead, it "present[ed] the separate question whether petitioners are immune from suit for the alleged violations." *Id.* The analytical framework applied in *Hui* thus confirms what the Court held in *Stanley*: A defendant's immunity is a "*separate question*" from the *Bivens* question.[5]

The unacknowledged reality here is that Petitioners are dissatisfied with the Court's decision in *Richardson v. McKnight*, 521 U.S. 399 (1997). In *Rich-*

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[5] The distinction between causes of action and immunity does not apply only to *Bivens*. Rather, as the Court's earlier quoted opinion in *Stanley* makes clear, the distinction arises from the fundamental difference in all federal litigation between an affirmative claim for relief and an affirmative defense. *Compare* Fed. R. Civ. P. 8(a) (a complaint need only present "a short and plain statement of the claim showing that the pleader is entitled to relief") *with* 12(b) (a "defense to a claim for relief in any pleading must be asserted in the responsive pleading").

ardson, the Court denied qualified immunity to private prison employees acting under color of state law—a holding that applies equally to those acting under color of federal law. *Id.* at 401; *Butz*, 438 U.S. at 504; *see also* Pet. Br. 38. The Court's holding in *Richardson* was grounded in two observations. First, the Court found no "'firmly rooted' tradition of immunity applicable to privately employed prison guards." 521 U.S. at 404. Second, the Court reasoned that private prisons, unlike public prisons, face "marketplace pressures" that will fulfill the goals of the qualified immunity doctrine, namely keeping guards from acting in an "overly timid" manner. *Id.* at 410. *Richardson* demonstrates that, as in *Hui* and *Stanley*, the immunity question is separate from the cause of action question. Indeed, to reason that private prison guards should be rescued from liability through the device of denying a *Bivens* action because the Court has previously found that there is *no* sufficient reason to immunize them would turn *McKnight*, as well as *Hui* and *Stanley*, on their heads.

II. A FEDERAL DAMAGES ACTION IS AN APPROPRIATE REMEDY FOR EIGHTH AMENDMENT VIOLATIONS SUFFERED BY FEDERAL INMATES CONFINED IN PRIVATE PRISONS.

As explained above, *Carlson* provides Pollard with a cause of action. Even if *Carlson* does not specifically sanction Pollard's action, however, this Court should still recognize Pollard's right to sue using a federal cause of action.

In evaluating a cause of action here, the first issue the Court must resolve is whether to decide the

availability of a *Bivens* remedy on a case-by-case basis or, instead, adopt a categorical approach. Petitioners argue that "this Court prefers [a] 'case-by-case determination[] of whether adequate alternative remedies exist to a blanket determination that *Bivens* is available to an entire class of plaintiffs.'" Pet. Br. 32 (*quoting* Pet. App. 64a). This claim is incorrect. This Court does not follow a case-by-case approach, and such an approach would impose significant burdens on district courts with no countervailing benefit.

After determining that a case-by-case approach should be rejected in favor of a categorical approach, the Court must determine which categorical rule to adopt. The two possibilities are to *bar* all *Bivens* actions brought by federal prisoners against private prison employees for Eighth Amendment violations, or to *permit* all such actions. The proper course is to permit such actions because the varied and uncertain tort remedies available under state law are inadequate to deter the variety of Eighth Amendment violations committed in federal prisons, and because there exist no special factors counseling hesitation in the recognition of a *Bivens* action.

A. A Case-by-Case Approach to Alternative State Remedies Should Be Rejected.

Petitioners urge this Court to adopt "a case-by-case" approach to the "determination[] of whether adequate alternative remedies exist." Pet Br. 32; *see also* U.S. Br. 27-28. That is, they would have district courts in every *Bivens* action brought by a privately held prisoner determine whether, on the specific facts of the prisoner's complaint, state remedies are available to him. This approach is contrary to this

Court's consistent practices in the *Bivens* area and would needlessly burden district courts.

1. When this Court approves or disapproves a *Bivens* action, it does so for an entire "context" or "category of defendants." *Malesko*, 534 U.S. at 68. Thus, when the Court approved a cause of action in *Bivens*, *Carlson* and *Davis v. Passman*, 442 U.S. 228 (1979), the Court did not hold that *only* Webster Bivens, Marie Green and Shirley Davis had a cause of action. It held that other plaintiffs similarly situated *also* had a cause of action. That much is obvious from the many Fourth and Eighth Amendment *Bivens* actions routinely heard before this Court and courts across the country. *See, e.g.*, *Wilson v. Layne*, 526 U.S. 603 (1999) (Fourth Amendment action); *Farmer v. Brennan*, 511 U.S. 825 (1994) (Eighth Amendment action). Similarly, when the Court rejected a cause of action in cases like *Stanley*, *Bush v. Lucas*, 462 U.S. 367 (1983), and *Schweiker v. Chilicky*, 487 U.S. 412 (1988), the Court did not leave open the door for other plaintiffs to bring suit. The Court barred *all* claims by enlisted personnel for harms incident to service, *all* First Amendment claims by federal employees, and *all* claims for the wrongful withholding of social security benefits. In *no Bivens* action has the Court adopted a case-by-case approach.

The case-by-case approach has been viewed as particularly inapt in cases where state remedies played a role in the Court's analysis, as in *Bivens*, *Malesko* and *Wilkie v. Robbins*, 551 U.S. 537 (2007). In *Bivens* itself, the Court considered whether Bivens could bring a constitutional action against federal agents who unlawfully entered his apartment or must instead bring "an action in tort, under state law." 403

U.S. at 390. The Court was skeptical that state remedies would be available because the common-law tort of trespass—Bivens' presumptive state cause of action—would be susceptible to the defense of consent in circumstances where consent would not obviate a Fourth Amendment violation. *Id.* at 394-95 (noting that a citizen "may bar the door against an unwelcome private intruder" but will find it "futile . . . to resist an unlawful entry" demanded by an officer of the law, especially because "resistance . . . may amount to a crime"). The Court thus held that "*regardless* of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen," a constitutional damages action could be brought. *Id.* at 392 (emphasis added). The Court did not hold that *Bivens* actions would be available only where a state remedy was questionable. It held that, because state remedies would often be of dubious value in remedying government misconduct, a federal action may be brought to remedy *all* Fourth Amendment violations, regardless of the availability (or not) of a state-law remedy.

The Court followed this same categorical approach in *Malesko*: In *Malesko*, a federal prisoner held by a private prison company sued the company for an Eighth Amendment violation. 534 U.S. at 64-66. The Court rejected a *Bivens* action because "the threat of suit against an individual's employer was not the kind of deterrence contemplated by *Bivens*." *Id.* at 70. In doing so, the Court noted the plaintiff's explicit concession that state remedies were "at least as great, and in many respects, greater, than anything that could be had under *Bivens*." *Id.* at 72. The opinion is clear, however, that even if state remedies had

been unavailable, a *Bivens* action against a private company would still have been barred. State remedies or not, the Court believed that a *Bivens* action against an entity, rather than an individual, failed to provide the type of deterrence for which *Bivens* was designed. A *Bivens* action against a prison company was therefore unavailable to *all* privately held prisoners, not just those whose attorneys conceded the adequacy of state remedies. *Id.* at 71.

Finally, in *Wilkie v. Robbins*, 551 U.S. 537 (2007)—the only *Bivens* case that Petitioners cite in favor of their case-by-case argument, Pet. Br. 32—the Court again adopted a categorical rule barring *Bivens* actions. The plaintiff in *Wilkie* sued federal agents for a pattern of "harassment and intimidation aimed at extracting an easement across [the plaintiff's] property." 551 U.S. at 541. The Court did not simply dismiss the suit in front of it, but held that *Bivens* does not authorize *any* suit alleging "retaliation for exercising . . . property rights" or "unjustifiably burdening . . . right[s] as a property owner." *Id.* at 562. A "freestanding [constitutional] damages remedy," the Court held, was inappropriate for such behavior because of the "difficulty of devising a workable cause of action." *Id.* at 550, 562. Moreover, had the Court seen its ruling as *sui generis*, there would have been no reason for it to express concern over a potential "onslaught of *Bivens* actions." *Id.* at 562.

Thus, in every one of this Court's cases in which a constitutional damages action was sought, the Court has ruled that the cause of action was or was not available in an entire "context" or "category of defendants." *Malesko*, 534 U.S. at 68. It has never confined its holding to the specific plaintiff or defendant before it.

2. Not only is a case-by-case inquiry into alternative remedies inconsistent with this Court's *Bivens* cases, but the approach would also needlessly burden district courts. When a federal prisoner brings a *Bivens* action, the district court judge must, under the Prison Litigation Reform Act (PLRA), prescreen the complaint to determine if it states a claim for relief. *See* 28 U.S.C. § 1915A. If the availability of a *Bivens* action in a particular case turns on the availability and adequacy of state remedies for each particular case, judges will be required in each case to search all of state law to determine whether the prisoner's complaint might state a claim under state law. This approach would involve an arduous process that would advance none of the principles underlying the *Bivens* doctrine.

First, under 28 U.S.C. § 1915A, federal judges searching for alternative state remedies will have only the prisoner's complaint before them. The judge will not have access to an answer or motion to dismiss that might elucidate the availability of state remedies. Moreover, the complaint will ordinarily be drawn with an eye towards federal constitutional law, not state law, and thus fail to address elements of state law that would be dispositive as to the availability (or not) of a state remedy. Making this task even more difficult will be the fact that a large proportion of prisoner complaints are filed *pro se* and thus lack clear allegations from which to search for state remedies.

Second, the search for alternative state remedies will be expansive. If district judges are instructed to evaluate state remedies on a case-by-case basis, the judges will be required to evaluate state statutes, regulations and cases, as well as similar laws at the

municipal and local level. Aside from the lack of pleadings by a defendant, this task will be frustrated further by the fact that state tort law pertaining to prisoners' rights is not well developed. This should not be surprising given that federal constitutional rights have long been enforced through federal, rather than state, causes of action. *See, e.g*, *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961) (finding state law insufficient to enforce federal constitutional rights because state remedies were "adequate in theory, [but] not available in practice"); *Bivens*, 403 U.S. at 394 (rejecting state law as inadequate to the task of federal constitutional enforcement because state law may be "inconsistent or even hostile" to federal constitutional rights); *Carlson*, 446 U.S. at 23 (holding that the enforcement of Eighth Amendment rights should not be "left to the vagaries of the laws of the several States"). District courts are likely to face state-law issues of first impression on a routine basis and presumably will attempt to resolve them, as federal courts do when sitting in diversity, by "predict[ing] what [the state supreme] court would decide if it were to address the issue." *Raines v. Safeco Ins. Co. of Am.*, 637 F.3d 872, 875 (8th Cir. 2011). This is no easy task.

Pollard's case is illustrative. Petitioners rely principally on *Giraldo v. Calif. Department of Corrections & Rehabilitation*, 85 Cal. Rptr. 3d 371 (Cal. Ct. App. 2008), to argue that "there can be no serious question" that Pollard had state remedies. Pet. Br. 25. *Giraldo*, however, was decided by an intermediate appellate court outside of Pollard's jurisdiction and dealt with a third-party attack on a transgendered prisoner. The decision came over six years after Pollard, acting *pro se*, filed his amended complaint and

was the first "California court [to] apparently discuss[], much less answer[]" the question of a jailer's duties to a prisoner. *Id.* at 382. Thus, under Petitioners' case-by-case approach, a district court prescreening Pollard's complaint to determine whether it stated a cause of action would have had to predict *Giraldo*'s holding six years before it was decided and then make the further leap of predicting that that holding would allow a state cause of action for Pollard's very different claims.

These interpretive challenges will persist far into the future. State statutes, regulations and common law will regularly change in response to concerns specific to each state. Indeed, it can be expected that prison companies will seek immunity for state-law wrongs from state legislatures and courts.

Third, it will not be enough for the district court to search for state causes of action based on a bare complaint. Consistent with this Court's observation in *Bivens* that a state-law defense will often frustrate the success of a state-law cause of action, district courts will also be required to evaluate the possibility of a viable defense. *Bivens*, 403 U.S. at 394 (rejecting a state-law remedy because the defendants might raise the defense of consent); *Malesko*, 534 U.S. at 74 n.6 (considering the applicability of the government contractor defense to a state-law action). At this stage of the case, without an answer, it will be impossible to determine with any certainty whether a defendant possesses a viable defense.

Thus, a case-by-case inquiry into alternative state remedies will be an arduous task. Perhaps the task could be justified if it yielded substantial countervailing benefits. But it does not. Unlike the inquiry into

federal alternative remedies, which is based on "bedrock principles of separation of powers," *Malesko*, 534 U.S. at 69, an inquiry into state remedies cannot be justified by "bedrock principles" of federalism because the dignity accorded states in our constitutional system is not implicated where a *federal* actor violates the *federal* constitutional rights of a *federal* prisoner. A case-by-case inquiry into state remedies is not only at odds with this Court's prior practices, but also a burdensome task that yields no benefits and advances no core constitutional values.

B. The Uncertain Patchwork of Remedies Available Under State Law Should Not Preclude the *Bivens* Action Alleged Here.

1. The purpose of a *Bivens* action is the "deterrence of individual officers who commit unconstitutional acts." *Malesko*, 534 U.S. at 71. A damages remedy plays a particularly important role in deterrence where constitutional violations are unexpected and short-lived, as in the Fourth or Eighth Amendment context. In these situations, victims have no opportunity to remedy their problems through injunctive or declaratory relief. *Butz*, 438 U.S. at 504. By the time the victim gets to court, the injuries have been felt and the constitutional violation has ceased. In these situations, "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

In pursuing the goal of deterrence, the Court has proceeded cautiously. Such caution is grounded in "bedrock principles of separation of powers." *Malesko*, 534 U.S. at 69. Just as the Court has the "power to award damages to the victim of a constitutional violation," Congress also enjoys a power over constitutional remedies. *Bush v. Lucas*, 462 U.S. 367,

378 (1983). Congress may create its own remedial scheme or may bar a *Bivens* remedy altogether. *Id.* Where Congress has spoken in the field of constitutional remedies, this Court has given wide berth to Congress' choices. *Id.*

For instance, in *Bush v. Lucas*, a federal employee brought a *Bivens* action against his supervisor for alleged First Amendment violations. As a federal employee, however, the plaintiff was already "protected by" the Civil Service Reform Act, "an elaborate, comprehensive scheme" that Congress "constructed step by step, with careful attention to conflicting policy considerations." *Id.* at 385, 388. Although Congress did not "expressly preclude[]" a *Bivens* action in its remedial scheme, the Court nonetheless found it unwise to "augment[]" Congress' remedial choices with "a new judicial remedy." *Id.* at 373, 388; *see also Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988) (refusing a *Bivens* remedy where Congress had already "provide[d] meaningful safeguards or remedies for the rights of persons situated as [plaintiffs]").

2. Occasionally, the Court has looked at state rather than federal alternative remedies in determining whether a *Bivens* action is appropriate. The Court's concern with state remedies is not grounded in "bedrock principles of separation of powers," because, as noted *supra* at 24, states have no shared role in creating constitutional enforcement schemes against federal officers. *Malesko*, 534 U.S. at 69. Instead, the inquiry into state remedies is grounded in the Court's concern for adequate deterrence of unconstitutional conduct. Only where a state remedy would provide significant deterrence is the need for a *Bivens* action less pressing.

This Court has heard four *Bivens* cases implicating state remedies and never once found a state remedy sufficient by itself to bar an entire class of plaintiffs from asserting a *Bivens* action. In *Bivens* itself, for example, a plaintiff sought constitutional damages after federal officers demanded and received entry into his apartment. 403 U.S. at 389. The defendants opposed the suit by arguing that Bivens should instead pursue "an action in tort, under state law." *Id.* at 390. The Court squarely rejected this argument, holding that the Fourth Amendment "guarantees to citizens an *absolute* right to be free from unreasonable searches and seizures." *Id.* at 392 (emphasis added). Thus, a federal cause of action was available "regardless of whether [state law] . . . would prohibit or penalize the identical act." *Id.* Aside from impoverishing an absolute right, relying on state law would likely prove ineffectual because "the interests protected by state laws . . . and those protected by the Fourth Amendment, may be inconsistent or even hostile." *Id.* at 394 (noting that consent might be a defense to a state-law action in circumstances where it would not bar a Fourth Amendment claim). Accordingly, state tort law could not be relied on to deter constitutional violations committed by federal officers.

In *Carlson*, the Court again expressed skepticism toward state remedies. The plaintiff in *Carlson* brought a *Bivens* action for Eighth Amendment violations. The defendants, several employees of a federally operated prison, argued that the plaintiff should pursue damages under the FTCA rather than under the Eighth Amendment. The Court rejected this argument in part because liability under the FTCA turned on the tort law of the "State in which

the alleged misconduct occurred." 446 U.S. at 23. The Court found it "obvious" that the enforcement of "federal constitutional rights" should not be "left to the vagaries of the laws of the several States." *Id.*

The Court discussed state remedies in relation to *Bivens* for a third time in *Malesko*. There, as discussed above, a federal prisoner brought a *Bivens* action against a correctional corporation for a violation of his Eighth Amendment rights. The Court rejected the action because of deterrence concerns. "The purpose of *Bivens*," the Court explained, "is to deter *individual* federal officers." 534 U.S. at 70 (emphasis added). "[I]f a corporate defendant is available for suit," however, "claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury." *Id.* In this situation, "the deterrent effects of the *Bivens* remedy would be lost." *Id.* at 70-71 (*quoting Meyer*, 510 U.S. at 485). Thus, the Court declined to authorize a *Bivens* action for fear it would discourage *Bivens* plaintiffs from seeking recovery from individual corporate employees and thus compromise the deterrent value of *Bivens* itself.

After holding that a "suit against an individual's employer was not the kind of deterrence contemplated by *Bivens*," *id.* at 70, *Malesko* noted the alternative remedies potentially available to the plaintiff. With regard to federal remedies, the Court suggested that the prisoner had the same remedy as a "federal prisoner in a BOP facility," namely, "a *Bivens* claim against the offending individual officer." *Id.* at 72. In addition, the plaintiff could obtain prospective relief through the "BOP's Administrative Remedy Program." *Id.* at 74. With regard to state remedies, the Court found the plaintiff likely had such remedies

because he "alleged . . . a quintessential claim of negligence."[6] *Id.* at 73.

Malesko's treatment of state remedies did not suggest that such remedies alone were sufficient to preclude a *Bivens* action; after all, as discussed *supra* at 19-20, the Court would hardly have held that *no* federal prisoner may sue a prison company simply because *this* prisoner likely had a negligence claim under New York law. The Court's categorical rejection of *Bivens* actions against corporate defendants was instead based only on a concern that would be common to *all* suits against prison companies—namely, that a "suit against an individual's employer was not the kind of deterrence contemplated by *Bivens*." *Id.* at 70.

The fourth and final case in which the Court considered state remedies, *Willkie v. Robbins*, 551 U.S. 537 (2007), confirms the roles of both deterrence and separation of powers in the Court's alternative remedy jurisprudence. In *Wilkie,* plaintiff Harvie Robbins brought a *Bivens* action against federal officials for a pattern of "harassment and intimidation aimed at extracting an easement" from him. *Id.* at 541. The

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[6] The plaintiff in *Malesko* did not allege any Eighth Amendment violations; he only alleged that the defendants were "*negligent* in failing to obtain requisite medication . . . and were further *negligent* by refusing . . . use of the elevator" and, in summary, that the plaintiff's injuries were a "result of the *negligence* of the Defendants." *Malesko*, 534 U.S. at 73 (emphasis in original). The only reason the suit even implicated the Eighth Amendment was that the "District Court . . . construed the complaint as raising a *Bivens* claim, presumably under the Cruel and Unusual Punishments Clause of the Eighth Amendment." *Id.*

pattern of harassment allegedly involved a variety of acts by federal officials, including unauthorized entry onto Robbins' property, several unjustified federal prosecutions, and the wrongful withdrawal of land use permits. *Id.* at 543-47. Consistent with its prior *Bivens* cases, the Court began its inquiry by asking whether "any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* at 550.

Turning first to the unauthorized entry onto Robbins' property, the Court found that Robbins had a "civil remedy in damages for trespass." *Id.* at 551.[7] As to the wrongful federal prosecutions, the Court found that Robbins had "some procedure to defend and make good on his position." *Id.* at 552. With regard to the withdrawal of land use permits, the Court found that federal "administrative review was available, subject to ultimate judicial review under the [Administrative Procedure Act]." *Id.* "In sum," the Court explained, "Robbins ha[d] an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints." *Id.* at 553.

Despite the existence of multiple alternative remedies, *Wilkie* did *not* find those remedies alone sufficient to preclude a *Bivens* action. As in the Court's

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[7] Presumably, the Court was referring to an FTCA action against the United States based on a state common-law trespass claim. Under the FTCA, only the United States itself, and not individual officers, can be sued for common-law harms committed by federal officers in the course of their employment. 28 U.S.C. § 2679(b).

other alternative-remedy cases, the Court's conclusion that the remedies did not suffice was based on concerns related to both separation of powers and deterrence. Although Robbins had a variety of potential remedies under different laws and in different tribunals, the Court found it "hard to infer" from this "patchwork" of remedies "that Congress expected the Judiciary to stay its *Bivens* hand"; thus, separation of powers considerations did not mandate rejection of *Bivens*. *Id.* at 554.

Similarly, this "assemblage of state and federal, administrative and judicial[,] . . . statut[ory] and common law" remedies offered, at best, a weak deterrent to "public officials bent on making life difficult" "over a period of six years." *Id.* at 554-55. "The whole [harm was] greater than the sum of its parts." *Id.* at 555. As such, Robbins' "patchwork" of subconstitutional remedies could not adequately deter the claimed constitutional violations. This lack of adequate deterrence in turn rendered the remedies themselves insufficient to preclude a *Bivens* action, though the Court went on to find that other considerations weighed against recognizing a *Bivens* action for such asserted violations.

In sum, this Court's cases show that the level of respect accorded to alternative remedies depends on considerations of both separation of powers and deterrence. The separation of powers rationale demands that, where Congress has created a remedial scheme to address the harms alleged by a *Bivens* plaintiff, the Court "stay its *Bivens* hand." *Id.* at 554. The deterrence rationale demands that *Bivens* bow to the existence of state remedies *only* where those remedies are plainly available and sufficient to satisfy the goal of deterrence as to entire classes of plain-

tiffs and defendants. In the previous four cases before this Court implicating state remedies, the Court has never once held that a state remedy was sufficient to bar an entire class of plaintiffs from bringing a *Bivens* action.

3. The Court should not withhold a *Bivens* action from privately held federal prisoners on the basis of alternative remedies. First, all parties and amici agree that Congress has neither "expressly precluded" a *Bivens* action here nor created an "elaborate, comprehensive scheme" to remedy the harm alleged. *Bush*, 462 U.S. at 373, 385. Thus, the only alternative-remedy question facing this Court is whether, in the face of congressional silence, it should turn over to states and state tort law the task of enforcing the Eighth Amendment in private federal prisons.[8]

The Court should not do so because the harms suffered by Pollard, and federal prisoners generally, as a result of Eighth Amendment violations do not clearly give rise to relief under state law. Although it is possible that a state remedy might be available for a particular harm in a particular case, state tort law rarely speaks to the distinct constitutional injuries suffered by federal prisoners. Where a complaint *certainly* states a claim under the Eighth Amendment,

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[8] As a privately held prisoner, Pollard has no remedy for an Eighth Amendment violation resulting from mistreatment by private prison employees under the Bureau of Prison's Administrative Remedy Program. 28 C.F.R. § 542.10; *see* U.S. Br. 5 n.2. In addition, even if an FTCA remedy could preclude a *Bivens* action, which it cannot under *Carlson*, 446 U.S. at 23, Pollard has no claim under the FTCA because the defendants are not "employees" of the United States. 28 U.S.C § 2679(b); *see also* Pet. Br. 42.

and Congress has not expressed its opinion on the matter, it is improper to dismiss the complaint purely because the prisoner *might* obtain relief under a state law.

Federal prisoners suffer a wide variety of constitutional harms. Like Pollard, many suffer the deprivation of nutrition, hygiene and medical care, or suffer intentional harms arising from physical contact with prison personnel. Other prisoners suffer attacks by other inmates, preventable suicides, or the denial of heat, ventilation or movement. State-law remedies for these harms are in many cases uncertain or nonexistent.

Take, for example, Pollard's claim that he was denied nutrition and hygiene. Petitioners confidently assure the Court that "there can be no serious question that Pollard's [state-law] remedies were 'at least as great, and in many respects much greater, than anything that could be had under *Bivens*.'" Pet. Br. 25 (*quoting Malesko*, 534 U.S. at 72). Petitioners' support for this claim, however, is long on general legal propositions and short on specific cases. "General propositions," however, "do not decide concrete cases." *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

Petitioners' first general proposition is that, under California law, "'persons have a duty to use due care to avoid injury to others, and may be held liable if their careless conduct injures another person.'" Pet. Br. 26 (*quoting Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992)). This overstates California law considerably. Although California law recognizes a *general* duty to be reasonable, this duty is far from universal. California courts routinely shield defendants from

liability where the "sum total . . . considerations of policy" militate against liability. *Dillon v. Legg*, 69 Cal. Rptr. 72, 76 (Cal. 1968) (*quoting* William Prosser, Law of Torts 332-33 (3d ed. 1964)). These policy considerations include:

> the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Cabral v. Ralph's Grocery Co., 122 Cal. Rptr. 3d 313, 318 (Cal. 2011) (*quoting Rowland v. Christian*, 70 Cal Rptr. 97, 110 (Cal. 1968)).

Moreover, just because a California court declares a duty in a particular circumstance does not mean that a duty will necessarily exist in an analogous circumstance. "California courts are increasingly treating duty as a live issue in every negligence case." Dilan A. Esper & Gregory C. Keating, *Abusing "Duty"*, 79 S. Cal. L. Rev. 265, 271 (2006).

This is not to say that California tort law is awash in a sea of uncertainty. For injuries that repeatedly occur, certainty exists. Those injured in a car accident can normally be certain that the defendant possesses a duty of care and that an action will be available for a breach of that duty. But for uncommon injuries—like the deprivation of food and hygiene by a

person performing services for the federal government—there is no certainty as to the availability of relief. California courts may award relief, or they may not. Without substantial prior precedent, any claim about the certainty of relief under California law is not credible.

The closest Petitioners come to providing any law relevant to Pollard's specific circumstances is their citation to *Giraldo v. California Department of Corrections & Rehabilitation*, 85 Cal. Rptr. 3d 371 (Cal. Ct. App. 2008), a case addressing the "special relationship between jailer and prisoner [and] imposing on the former a duty of care to the latter." Pet. Br. 26. This case undermines, not supports, Petitioners' argument.

As noted above, *supra* at 22-23, *Giraldo* involved a transgendered prisoner's claim that prison employees had a duty to protect him from attacks by other prisoners. Not only are the facts of *Giraldo* markedly different from those alleged by Pollard, but the opinion was issued by the Court of Appeals for the First District, an intermediate appellate court having no authority over the law applicable in Taft, California, which is located in California's Fifth District. It is possible that the Court of Appeals for the Fifth District would follow *Giraldo*, but, as this Court knows, courts are apt to disagree with one another on a regular basis. To argue that Pollard had state remedies here is thus to argue that Pollard was required to predict that the Fifth District would follow the First, and that the Fifth District would view a case involving an attack on a transgendered inmate in a publicly run state facility applicable to a claim for the deprivation of food and hygiene in a privately run federal facility.

Even if *pro se* prisoners, or even federal courts, should be required to make these judgments, such a judgment would not have been possible here because, as noted above, *Giraldo* was not decided until 2008, *six years after* Pollard filed his amended complaint. Nor was prior law available on this topic. As *Giraldo* explained, as of the date of its opinion, "no California court ha[d] apparently discussed, much less answered" the question whether a jailer has a duty to protect a prisoner from harm. *Id.* at 382.

In sum, Petitioners' argument comes down to this: An intermediate appellate court having no authority over the law in Taft, California, held that jailers have a duty to protect inmates from attacks by other prisoners; therefore, Pollard can certainly obtain relief for the deprivation of food and hygiene or any other possible Eighth Amendment violation. Petitioners' reasoning is far too tenuous to assure this Court that the deterrent value of *Bivens* will systematically be fulfilled by California law.

Looking beyond California law, Petitioners' argument fairs no better. Acknowledging that a case-by-case analysis of state remedies is not pre-ordained here, the Petitioners argue that the tort law in "others states" will provide federal prisoners with sufficient remedies. Pet. Br. 33. Tellingly, the Petitioners do not argue that *all* states provide prisoners with remedies for the full spectrum of Eighth Amendment injuries. They simply offer the Court a footnote containing a string of sources allegedly demonstrating that prisoners "have that most fundamental of tort claim, [one] in which one person's negligent conduct causes physical and/or emotional harm to another." Pet. Br. 33 (*quoting* Pet. App. 11a (Bea, J., dissenting)).

As with Petitioners' claims about California law, this argument speaks only in the most general terms and thus underscores the ambiguous nature of state remedies for prisoners held in private federal facilities. Simply because "negligent conduct causes physical and/or emotional harm to another" does *not* mean that the injured party will have a remedy. As in California, the Restatement (Third) of Torts that holds sway over so many state courts states that the general duty to be reasonable can be suspended where a "countervailing principle or policy warrants denying or limiting liability in a particular class of cases." Restatement (Third) of Torts § 7 (2010). Thus, because policy goals differ among jurisdictions, whether a prisoner can obtain a remedy under state law will depend on the divergent and ever-changing laws of the 50 states, the District of Columbia and multiple federal territories.

The concern here is not that states will be unable or unwilling to enforce federal constitutional rights. States have long proven themselves invaluable allies of the federal courts in enforcing civil rights. *See, e.g., Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976). The concern is that states will evaluate common-law tort claims of federal prisons in an inappropriately parochial manner, especially given that the principles they announce in such cases will apply to potential claims against their own state officers by state prisoners. A state faced with significant prison overcrowding and billions of dollars in budget shortfalls, for example, likely will view the duties of jailers in a light different from a state with no such challenges. *See, e.g., Brown v. Plata*, 131 S. Ct. 1910 (2011). States can hardly be blamed for such parochialism when privately held federal prisoners account for on-

ly tiny minority of state prison populations[9] and state law explicitly requires courts to consider matters of public policy that will likely affect far more cases brought by state prisoners than actions by federal prisoners.

Relying on states for the maintenance of federal rights in federal prisons would be less problematic if this Court possessed the authority to review state court decisions denying relief. Under Petitioners' proposed rule, however, no such review will be possible. If a privately held federal prisoner suffering an Eighth Amendment injury brings a claim for relief under state law in state court, and the state court rejects the claim, this Court will be unable to review the state court holding because the case would lack a federal question. *See* 28 U.S.C. § 1257. If the federal prisoner brings the same claim in federal court under diversity jurisdiction, this Court's longstanding practice is to decline review. *See* Sup. Ct. Rule 10; Richard H. Fallon *et al.*, The Federal Courts and The Federal System 1476 n.1 (2009) (noting the Court's reluctance to review federal court decisions presenting only state-law issues). Moreover, even if this Court chose to review the district court's ruling, it would be bound by state law. *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State."). Thus, if

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[9] Privately held federal prisoners account for approximately two percent of the prisoners held in each state. *See* Bureau of Justice Statistics, Prisoners in 2009, at 1, 34 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf.

this Court turns over the deterrence of constitutional violations to actions based on state tort law, it must do so without any expectation that it will be able to exercise review.[10]

Given this lost capacity for review, the scope of state law becomes of paramount importance. Unlike Petitioners, the United States actually admits that some constitutional claims may not be "redressable under state law." U.S. Br. 24-25 (*citing Schweiker*, 487 U.S. at 421-22; *Bush*, 462 U.S. at 388). This should not trouble the Court, the United States argues, because complete redressability is not required under this Court's alternative remedy jurisprudence. Although it is true that the Court has withheld a *Bivens* action where alternative remedies provided less than "complete relief," *Bush*, 462 U.S. at 385-86, the Court has done so only where the prescribed remedies derived from deliberate choices by Congress, thus implicating separation of powers concerns. *Schweiker*, 487 U.S. at 425 (rejecting *Bivens* action because Congress "provide[d] meaningful safeguards or remedies for the rights of persons situated as respondents were"); *Bush*, 462 U.S. at 386 (refusing a *Bivens* action because the plaintiff's

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[10] Of course, in any given case, a federal court could hold that a state remedy did not exist for a particular Eighth Amendment violation and could provide a federal remedy, thus maintaining the supremacy of federal law. But this could only occur if the Court here adopted a case-by-case approach—an approach that, as explained *supra* at 17-24, is both unprecedented and inadvisable. If this Court holds that, as a categorical matter, privately held federal prisoners may not bring a *Bivens* action, then no federal court will possess any authority to ensure that such Eighth Amendment violations are deterred through state-law damages actions.

claims were "fully cognizable" within an "elaborate, comprehensive scheme" created by Congress). Where separation of powers concerns are not present, the sufficiency of an alternative remedy system turns on the system's capacity to deter constitutional violations. Adequate deterrence does not require that each violation be met with "complete relief," but it does require that each violation be redressable with *some* relief. Without at least some relief, *Bivens*' objective of deterrence cannot be satisfied.

In this case, Congress has made no deliberate choice with respect to remedies for privately held federal prisoners. The question therefore is whether the separate remedial systems of the 50 states, the District of Columbia and multiple territories will each provide *some* relief to prisoners who suffer Eighth Amendment violations. Neither the United States nor Petitioners have shown that such relief will be available.[11]

There is another reason to doubt that tort suits will have the deterrent force claimed by Petitioners. Petitioners assert that tort suits are superior to a *Bivens* remedy because "a prisoner in a privately managed facility will generally be able to seek vicarious liabil-

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[11] Petitioners attempt to shift the burden to *Pollard* to prove that "there is any state which does not provide recovery" for his injuries. Pet. Br. 33 (*quoting* Pet. App. 11a (Bea, J., dissenting)). But this imposes on Pollard the impossible task of proving a negative. For at least a half century, civil rights have been enforced through federal law and primarily in federal courts. *See Monroe*, 356 U.S. at 183 (rejecting state law as insufficient for the enforcement of federal rights); *Bivens*, 403 U.S. at 392 (same). It is thus not surprising that state tort law pertaining to prisoners' rights is sparse.

ity against the contractor under *respondeat superior*. . . . Indeed, a claimant would ordinarily *prefer* a state tort suit against the company given the certainty of recovery." Pet. Br. 31 (emphasis added). If Petitioners' claim is true—that state tort suits will generally result in liability on the part of private prison companies rather than the individual employees who are responsible for the wrongful conduct—then a *Bivens* action is even more justified here. This Court has thrice held that suits against entities are *inferior* to suits against individuals in deterring unconstitutional conduct. *Carlson*, 446 U.S. at 21; *Meyer*, 510 U.S. at 485; *Malesko*, 534 U.S. 70-71. Thus, by Petitioners' own admission, the remedial system they propose does not provide "the kind of deterrence contemplated in *Bivens*." *Malesko*, 534 U.S. at 70.

C. This Cause of Action Does Not Give Rise to Special Factors Counseling Hesitation.

In addition to considering a plaintiff's remedial alternatives, this Court's *Bivens* jurisprudence takes account of "any special factors counselling hesitation before authorizing a new kind of federal litigation." *Wilkie*, 551 U.S. at 550 (quoting *Bush*, 462 U.S. at 378). None of the factors previously recognized by the Court applies in this case. Nor is any hesitation needed here because of "policy determinations made by the Congress." *Bush*, 462 U.S. at 373.

1. This Court has held that "special factors" stand in the way of a *Bivens* action in three circumstances. First, in *Chappell v. Wallace* and *United States v. Stanley*, the Court rejected *Bivens* actions between military personnel. In the Court's view, the military context demands such "inescapable . . . obedience to

orders" that the "rights of men" must bow to "certain overriding demands of discipline and duty." *Chappell v. Wallace*, 462 U.S. 296, 300 (1983); *see also Stanley*, 483 U.S. at 679-80. There is no argument here that the cause of action touches on the military. Although it might be contended that the administration of prisons requires military-like obedience and discipline, this Court's cases are clear that constitutional damages actions *are* appropriate in the prison context. *See, e.g., Carlson*, 446 U.S. 14; *Farmer*, 511 U.S. 825.

Second, in *Wilkie*, the Court held that the "difficulty of devising a workable cause of action" amounted to a special factor that precluded a *Bivens* action. *Wilkie*, as noted earlier, involved a rancher's claim of "retaliation" by federal officials for his refusal to grant the government an easement over his land. 551 U.S. at 562. Although the Court suggested it viewed the officials' conduct as inappropriate in some respects, it ultimately denied a cause of action because it could not craft a "workable" distinction between "hard bargaining," which is constitutionally permissible, and "illegitimate pressure," which arguably is not. *Id.*

The special factor applicable in *Wilkie* does not apply here. A cause of action to enforce a prisoner's Eighth Amendment rights is eminently "workable." Federal courts have adjudicated Eighth Amendment *Bivens* actions for thirty years, *see Carlson*, 446 U.S. 14, and have been resolving the same actions against state officials for even longer. *See, e.g., Estelle v. Gamble*, 429 U.S. 97 (1976). There is a large and ever-growing body of precedent distinguishing permissible from impermissible behavior, rendering the action asserted here workable.

Third, in *FDIC v. Meyer*, the Court labeled as a special factor the "potentially enormous financial burden" that a *Bivens* action might impose on the federal government. 510 U.S. at 486. *Meyer* involved a *Bivens* action against a federal agency. The Court rejected the action in part because parties would aim their damages actions at federal agencies rather than federal officials, which would in turn impose a significant financial burden on the federal government.

Recognizing a *Bivens* action here would not impose a "potentially enormous financial burden" on the United States. To begin with, any liability imposed on Petitioners in a *Bivens* case would fall first on Petitioners themselves, *not* on the United States or even on the private prison company. Even if a portion of this liability were passed on to the United States, however, it can hardly be contended that the federal government will suffer financial hardship. To the extent that the costs of *Bivens* liability are passed on to the employers of the responsible employees, the United States already absorbs the costs of *Bivens* liability for prisoners in BOP facilities and this Court has never characterized such costs as excessively burdensome. Moreover, if the prison industry's claims about cost savings are correct, *see* http://www.thegeogroupinc.com/facts.asp, relying on private prisons—even with whatever incremental costs may be attributed to *Bivens* liability—will continue to cost the federal government significantly less than using BOP-operated facilities.

In any event, it is doubtful that imposing *Bivens* liability on private prison employees will increase prison companies' costs, let alone the expenses of the federal government. To the extent that prison com-

panies indemnify their employees for liability arising from conduct in the course of employment (and presumably also insure themselves against such costs), the imposition of *Bivens* liability would not substantially increase the indemnification costs already faced by private prisons. If a *Bivens* action is, as Petitioners claim, wholly duplicative of state-law actions, private prisons have nothing to fear from *Bivens* liability. Private prisons *already* face such liability costs, and because double recovery for the same harm is barred, a *Bivens* action will not increase these liability costs. *Medina v. District of Columbia*, 643 F.3d 323, 328 (D.C. Cir. 2011) (holding that an injury caused by behavior in violation of constitutional and sub-constitutional law only merits a single damages award). And even if, as is more likely the case, *Bivens* claims will lie in circumstances where state law would not provide a recovery, the marginal cost of such claims as compared to costs already incurred to insure against other liabilities, are unlikely to be significant.

Finally, Petitioners' argument about the financial ramifications of this suit is more than a little ironic. Petitioners argue that a ruling in favor of Pollard would "potentially increase the government's cost of contracting." Pet. Br. 44. Because government contractors naturally "pass along litigation costs" to the federal government, the argument goes, the government's "cost of contracting" in turn may rise. *Id.* Yet, at the same time, Petitioners claim that damages for conduct that violates the Eighth Amendment should be pursued only under state law, which, in their opinion, provides remedies "'at least as great and in many respects greater, than anything that could be had under *Bivens*.'" *Id.* at 25 (*quoting Malesko*, 534

U.S. at 72). If Petitioners are correct that Pollard has state-law remedies, and correct that these remedies are superior to his *Bivens* remedies, then Petitioners must be *incorrect* in arguing that a *Bivens* action here will increase the government's "cost of contracting." Conversely, Petitioners' evident fear of increased liability casts grave doubt on their confident assertions that *Bivens* claims add no deterrent value to claims already possible under state law.

2. Not only are there no special factors that apply in this case, but there are no "policy determinations made by the Congress" that suggest a *Bivens* action should not be recognized. *Bush*, 462 U.S. at 373. Indeed, Congress has been aware of *Bivens* actions since their inception in 1971 and never once attempted to limit them in any way.

Understanding Congress' view of *Bivens* first requires an understanding of the FTCA. Twenty-five years before *Bivens* was decided, Congress enacted the FTCA. Pub. L. No. 79-601, 60 Stat. 842 (1946). The statute waived the federal government's sovereign immunity for torts committed by federal employees in circumstances where a private actor would be liable. 28 U.S.C. § 1346(b). Where a federal employee committed a common-law tort, the government agreed to assume responsibility on a *respondeat superior* basis. The original FTCA, of course, expressed no congressional opinions about *Bivens*, which was not decided until 1971.

In 1974, three years after *Bivens* was decided, Congress amended the FTCA to include suits against the federal government for the intentional common-law torts committed by its employees. Given that the Supreme Court had recently handed down *Bivens*, Con-

gress could have abrogated *Bivens* and forced claimants to rely on common-law intentional tort actions to provide remedies even for conduct that also violated their constitutional rights. Congress considered this option, but in the end preserved *Bivens*. *See* S. Rep. No. 93-588, at 3 (1973). In the statute, Congress made it "crystal clear . . . that victims . . . of intentional wrongdoing . . . shall have an action under the FTCA against the United States *as well as* a *Bivens* action against the individual officials." *Carlson*, 446 U.S. at 20 (emphasis added).

Then, in 1988, eight years after *Carlson*, Congress amended the FTCA again, this time in response to the Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988). Commonly known as the Westfall Act, the legislation abrogated *Westfall*'s holding that federal employees could be personally liable under state tort law, along with the federal government itself, for actions taken within the scope of their employment. Although the FTCA had long permitted plaintiffs to sue the federal government, it had not affirmatively barred suits against individual government employees for wrongs committed in the course of their employment. The Westfall Act did just this by making an FTCA suit against the government the "exclusive" remedy for common-law torts committed by federal employees. 28 U.S.C. § 2679(b).

Aware of the Court's decision in *Carlson* that *Bivens* actions were not displaced by the FTCA, Congress could have taken this opportunity to reject some or all of the Court's *Bivens* jurisprudence by, for example, making the FTCA the exclusive remedy for all intentional misconduct committed by govern-

ment employees, including constitutional torts.[12] Congress did the exact opposite, however. It affirmed *Bivens* by providing that, for damages actions "brought for a violation of the Constitution of the United States," an FTCA action is *not* the exclusive remedy and the federal government is *not* itself liable. 28 U.S.C. § 2679(b); *see also* H.R. Rep. 100-700, at 6 (1988) (noting that the Westfall Act "would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights"). In other words, Congress expressly preserved constitutional torts against individual officers.

The next pertinent piece of legislation came in 1996 with the enactment of the PLRA. In the PLRA, Congress addressed the perceived problem of excessive and frivolous litigation by prisoners. Given that *Carlson* explicitly approved of damages actions against federal prison guards, one would think that Congress, if it wanted to eliminate *Bivens* actions by prisoners, would have barred them at that point. But Congress did not take that path. Instead of barring a

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[12] Notably, as this Court held in *United States v Smith*, 499 U.S. 160 (1991), the FTCA in many instances bars common-law tort actions against federal employees for actions taken in the scope of their employment even where the FTCA would not actually provide any relief. *See* 28 U.S.C. § 2679(b) (making FTCA actions the "exclusive" remedy for common-law harms caused by federal employees); 28 U.S.C. § 2680(a) (barring government liability under the FTCA where the common-law was caused by the "perform[ance] [of] a discretionary function"). Thus, Congress could readily have made the FTCA exclusive of *Bivens* claims against federal employees, as it did with respect to other tort claims, even while preserving the United States' own immunity against constitutional tort claims.

particular cause of action *in toto*, Congress chose to limit *all* federal claims brought by prisoners in certain ways. Thus, in the PLRA, *all Bivens* and § 1983 claims brought by prisoners were made subject to exhaustion requirements, 42 U.S.C. § 1997e, mandatory prescreening, 28 U.S.C. § 1915A, limitations on recovery of emotional damages, 42 U.S.C. § 1997e(e), and mandatory payment of filing fees. 28 U.S.C. § 1915(b). The PLRA, like the legislation before it, reveals that Congress accepts *Bivens* actions as part of the traditional landscape of constitutional enforcement.

Against this history, Petitioners nonetheless maintain that Congress has "expressed the . . . intent" that *Bivens* actions against private prison guards be barred. Pet. Br. 41. According to Petitioners, this "intent" is revealed in Congress' "deliberate decision *not* to include any employees of government contractors within [the FTCA]." *Id.* at 42. This "deliberate decision" was made in 1946, however, 25 years *before Bivens* was decided. It is inconceivable that Congress' intent in 1946, to the extent it is known, can reveal Congress' disapproval of *Bivens* and its progeny. If anything, the only deliberate decision that can be attributed to Congress is the decision to *remove* constitutional tort actions from the reach of the FTCA. In this sense, private prisons employees occupy the same position as BOP employees: The availability of a *Bivens* action is a matter separate and unrelated to the content of the FTCA.

There is another problem with Petitioners' argument. If it is true that Congress disapproved of *Bivens* actions against those not covered by the FTCA, then one would have expected the Court to seize on this point in *Malesko*. After all, the corporate

defendant in *Malesko*, like the employees here, fell outside the purview of the FTCA. 28 U.S.C. § 2671. Yet the Court never brought up that concern and, indeed, never adverted once to the preferences of Congress on the issue presented here.

3. Petitioners warn this Court of an "increase in federal court litigation nationwide" should it approve a cause of action here. Pet. Br. at 43-44. This assertion is incorrect. According to Petitioners' own data, federal prisoners account for approximately 1,600 *Bivens* cases per year. Pet. App. 28. Because private prisoners account for 16.4% of the federal prison population, it is reasonable to assume that private prisoners contribute, at most, about 260 cases to this total. *Id.* Of these 260 cases, even absent a *Bivens* action, a large percentage of them will likely end up in federal court under diversity jurisdiction or removal jurisdiction.[13] *See* 28 U.S.C. § 1332. But even assuming, generously, that 50% of these cases will end up in state court, a ruling in favor of Petitioners here would only save the federal courts about 130 cases per year. This amounts to approximately 1.4 cases saved in each judicial district, or about .2 cases saved for each district court judge. A ruling in favor of Pollard will thus have little or no effect on the amount of litigation handled by the federal courts.

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[13] Federal inmates are routinely held in prisons outside of their home states and thus, when injured by a prison employee, often find themselves completely diverse from the putative defendant. *See Hall v. Curran*, 599 F.3d 70, 72 (1st Cir. 2010) ("[C]ourts presume that the prisoner remains a citizen of the state where he was domiciled before his incarceration").

Moreover, if the Court were to accept Petitioners' invitation to consider alternative remedies on a case-by-case basis, Pet. App. 32, there will probably be no decrease at all in federal prison litigation. Under such a regime, the rational plaintiff would allege *both* state and federal claims in the same suit, thus justifying federal jurisdiction under 28 U.S.C. § 1331 or § 1441 in *every* suit. Given the uncertainty of state remedies and the preclusive effects of an adverse judgment, plaintiffs would have nothing to lose and everything to gain by alleging federal constitutional violations along with their state-law claims.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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IN THE

Supreme Court of the United States

MARGARET MINNECI; JONATHAN E. AKANNO; ROBERT SPACK; BOB D. STIEFER; AND BECKY MANESS,

Petitioners,

v.

RICHARD LEE POLLARD *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

Bivens remedies cannot be authorized except in extraordinary circumstances based on a showing of need. Yet respondent ("Pollard") does not attempt to make such a showing on the facts of this case. To show inadequacy of traditional remedies, Pollard needs to show that his allegations would state a claim under the onerous standards of the Eighth Amendment yet fail under the far more generous standards of state law. But he identifies no principle of California law (or that of any other state) that has *ever* denied such a cause of action to a prisoner

harmed by a jailer's negligent conduct, much less the kind of willful or malicious conduct required to state an Eighth Amendment violation.

Nor does Pollard contest that, as a result of Congressional action, defendant private contractor employees face materially different legal circumstances than their Federal government counterparts. Whereas Congress has preempted all state law tort claims against individual government employees—leaving plaintiffs with no non-constitutional damages remedies—it has done the opposite for people like petitioners. And whereas Congress, by statute, has expressly preserved *Bivens* claims against actual government employees, it excluded contractors from the scope of that statute. Moreover, unlike individual government employees, petitioners have no recognized qualified immunity defense.

Pollard thus seeks to extend *Bivens* to a new context and category of defendants not considered in *Carlson* v. *Green*, 446 U.S. 14 (1980), or any other precedent. Yet he does not justify the need for that extraordinary remedy on the facts of *this* case, as the Court has always required. Instead, Pollard urges the Court to create a blanket "categorical" damages remedy for *every* Eighth Amendment claim against private contractor employees, based on unfounded speculation about the possible existence of some future hypothetical case in some unspecified jurisdiction where a plaintiff might conceivably lack a state law remedy under some unknown legal principle yet to be devised. This approach contradicts the Court's *Bivens* jurisprudence and would overstep the judiciary's proper role. The essence of adjudication is applying legal principles to the specific facts of the case before the court. By

contrast, it is the job of legislators to use policy principles to create blanket categorical rules without regard to the facts of specific cases.

Pollard has not shown that he is entitled to a *Bivens* remedy in this case. If a future plaintiff suing a private employee presents materially different circumstances—and there is no reason now to believe that would ever happen—that plaintiff could attempt to make a contrary showing. But it is the job of Congress, not this Court, to craft "categorical" federal causes of action without regard to whether they may be necessary in any particular case. The Court should therefore reverse the Ninth Circuit's judgment and uphold the district court's dismissal of Pollard's amended complaint.

ARGUMENT

I. THE COURT HAS NOT ALREADY DECIDED THIS CASE.

Pollard first argues that the Court, in *Carlson* and *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61 (2001), already decided the question in this case. *See, e.g.*, Resp. Br. 7 ("Pollard's case is on all fours with *Carlson*."); *id.* at 12 (Court in *Malesko* "believed that *Bivens* actions were available against private prison employees"). Not even the Ninth Circuit adopted this argument, and for good reason.

1. The Court requires an independent justification before it will extend *Bivens* to "any new context or new category of defendants." *Malesko*, 534 U.S. at 68. This case involves both a new context and a new category of defendants: claims for which there are adequate alternative remedies asserted against private contractor employees who are not covered by the Federal Tort Claims Act ("FTCA") and who lack a

recognized qualified immunity defense. *Carlson*'s context differed, because the plaintiff lacked alternative remedies, and the defendants were actual government employees with qualified immunity. And in *Malesko*—the Court's only previous *Bivens* case involving a private defendant—the Court expressly left open the question now presented, because no individual defendant was a party to that case. *Id.* at 65 ("[T]he parties agree that the question whether a *Bivens* action might lie against a private individual is not presented here.").

As the opening brief explained, this case is materially different from *Carlson*. *See* Pet. Br. 15-19, 39, 41-42; *see also* U.S. Br. 20. First, in *Carlson*, the plaintiff had no state law remedy, 446 U.S. at 17 n.4, and the Court therefore inferred a federal survivorship remedy under *Bivens* to ensure the possibility of relief, *id.* at 24. Moreover, in the Westfall Act Congress subsequently preempted all state damages claims against actual government employees, 28 U.S.C. § 2679(b)(1), eliminating any alternative relief against such defendants. But here, state remedies exist unpreempted because Congress has expressly excluded private contractor employees from the FTCA. 28 U.S.C. § 2671. Moreover, whereas *Carlson* found no reason to hesitate in creating a *Bivens* action because the defendants were protected by qualified immunity, 446 U.S. at 19, petitioners here have no such recognized defense. Pet. Br. 37-41.

Second, *Carlson* relied on Congress's "crystal clear" intent to make the FTCA remedy against the United States parallel and complementary to the *Bivens* remedy against individual government officers. 446 U.S. at 18. The Westfall Act subsequently codified

that intent by expressly preserving *Bivens* claims against individual "government employees," 28 U.S.C. § 2679(b)(2)(A), who otherwise face no claims at all. But no such intent exists in this case. There is no parallel FTCA remedy, and the category of "government employees" against whom Congress preserved *Bivens* claims expressly excludes petitioners and other contractor employees. Pet. Br. 42.

For these reasons, this case is not "on all fours with *Carlson*." Resp. Br. 7. Pollard's brief neither disputes these points nor explains why they do not materially distinguish this case from *Carlson*.

Pollard's assertion that *Malesko* resolved the issue in this case, *see id.* at 5, 12, is specious. As noted, *Malesko* expressly left the issue open. According to Pollard, the Court in *Malesko* "explained that, *in the private prison setting*, 'a *Bivens* claim against the offending individual officer' is an appropriate remedy." *Id.* at 5 (quoting *Malesko*, 534 U.S. at 72) (emphasis added). That is a distortion of the Court's opinion. The Court actually stated that "[i]f a federal prisoner *in a BOP facility* alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer, subject to the defense of qualified immunity." *Malesko*, 534 U.S. at 72 (emphasis added). By omitting the words "in a BOP facility," Pollard's brief implies that the Court held something it did not. In fact, while *Malesko* did not decide the issue presented here, the Court's reasoning compels dismissal of Pollard's claims. *See* Pet. Br. 21.[1]

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[1] Pollard's discussion of the litigants' positions in *Malesko*, Resp. Br. 10-12, is irrelevant. It is the Court's opinion, not the litigants' arguments, that governs here. But Pollard is wrong

2. Pollard's contention that *Carlson* decided this case also relies on the mistaken view—which permeates his entire brief—that a *Bivens* right of action can only be recognized on a "categorical" basis, rather than by considering whether the claim is justifiable on the facts of the case before the Court (which Pollard dismissively calls the "case-by-case" approach). *See, e.g.*, Resp. Br. 17 ("[A] case-by-case approach should be rejected in favor of a categorical approach."); *id.* at 18 ("In *no Bivens* action has the Court adopted a case-by-case approach."). This view both overstates the judiciary's proper role and contradicts the Court's precedents.

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in asserting that the United States took a position in *Malesko* on individual *Bivens* liability. As the United States now explains, it merely assumed the possibility of such liability for purposes of argument. *See* U.S. Br. 21 n.9. In *Malesko*, counsel for the United States was asked during oral argument whether the Government was "making that [assertion] as *arguendo* or are you conceding that?" and counsel replied that "it should be assumed *arguendo* because if there's a reason not to subject * * * the private individuals, to liability under *Bivens*, it would be that private individuals have so few immunities and so few defenses, compared to their governmental counterparts, that there's no reason to infer a Federal cause of action." *Malesko* Oral Arg. Tr. 19-20. The United States made the same point in its *Malesko* brief, in language that Pollard omits from his own discussion. *See* U.S. *Malesko* Br. 17 n.6 ("private-sector employees generally have greater exposure to state law claims and fewer immunities than their public-sector counterparts, which may lessen the imperative of inferring a constitutional cause of action"). The United States now expressly takes that position in this case, arguing that individual liability is improper. And although counsel for the *Malesko* petitioner, unlike the United States, did purport to concede the existence of individual liability, he admitted at argument that the concession was effectively meaningless since no individuals were defendants. *Malesko* Oral Arg. Tr. 10-11.

There is no "categorical" approach to adjudication that announces legal rules without regard to whether they are properly applied to the facts of a case before the Court. If the circumstances of a later case are materially indistinguishable from a decided case, the earlier rule governs under *stare decisis* (unless overruled). But if the circumstances are materially different, a different rule will apply. Pollard recognizes as much when he admits that the holdings of prior *Bivens* cases apply only to "other plaintiffs similarly situated." *Id.* at 18. The relevant question is thus whether Pollard and the petitioners here are in fact "similarly situated" to the parties in *Carlson*, *Bivens*, or *Davis* v. *Passman*, 442 U.S. 228 (1979). They are not—because, *inter alia*, Pollard has adequate state law remedies while those plaintiffs did not, and petitioners face materially different legal circumstances than their Federal government counterparts.

Nor has the Court applied Pollard's "categorical" approach in past *Bivens* cases. Pollard argues that because the Court held that the *Carlson* plaintiff had a *Bivens* claim for violation of the Eighth Amendment, that right of action must be available to anyone asserting such a violation. Resp. Br. 7. But the Court expressly held to the contrary in *Malesko*, denying a *Bivens* remedy to a plaintiff alleging Eighth Amendment violations because those claims arose in different circumstances than *Carlson*.

Similarly, no fair-minded reader of *Wilkie* v. *Robbins*, 551 U.S. 537 (2007), could conclude that the Court adopted any "categorical rule" divorced from the facts of that case. Resp. Br. 20. The Court stressed that a *Bivens* remedy "is not an automatic entitlement no matter what other means there may

be to vindicate a protected interest." *Wilkie*, 551 U.S. at 550. It then proceeded, in that "factually plentiful case," to analyze on an almost microscopic level whether the specific plaintiff had adequate remedies for each of his idiosyncratic claims. *Id.* at 551. The Court held that "when the incidents are examined one by one, Robbins' situation does not call for creating a constitutional cause of action for want of other means of vindication," and it declined to infer an action based on "the course of dealing as a whole." *Id.* at 555. The Court specifically *rejected* the invitation to create a cause of action at a "high level of generality," *id.* at 561, because such a right "may come better, if at all, through legislation," *id.* at 562.

As in *Wilkie* and every other *Bivens* case the Court has considered in the last 30 years, Pollard has not justified the need for a new remedy in the circumstances of his case (or, indeed, any case). *Wilkie*'s holding underscores the fundamental flaw in Pollard's "categorical" approach. Courts engage in adjudication, not legislation. The essence of adjudication is the "case-by-case" approach, which is the application of legal principles to the facts of the specific case before the court. Pollard disparages this approach because he cannot justify the result he favors on the facts of his case. But it is the role of legislators, not judges, to weigh broad policy concerns and enact "categorical" causes of action without regard to any specific case or controversy.

Congress has done just that in this area. *See, e.g.*, 42 U.S.C. § 1983 (legislating civil liability for those who violate the Constitution "under color of" state and local, but not federal, law); 18 U.S.C. § 242 (legislating criminal, but not civil, liability for those who violate the Constitution "under color of any

law"). Pollard's comparison between his situation and the statutory rights of prisoners in state and local custody, Resp. Br. 8, is therefore inapt. Pollard argues that, if he has no *Bivens* remedy, state and local prisoners in private facilities can assert constitutional claims under Section 1983 while federal prisoners will have different avenues of relief. The reason, however, is that *Congress* has enacted a statute covering actions taken under color of state and local law but never enacted a comparable statute in the federal context.

Given that the text of no statute or constitutional provision supports that result, creation of Pollard's proposed categorical cause of action is a job for Congress, not this Court. *See, e.g.*, *Wilkie*, 551 U.S. at 562; *Bush* v. *Lucas*, 462 U.S. 367, 389 (1983).

II. POLLARD HAS NOT SHOWN THAT HE LACKED ADEQUATE ALTERNATIVE REMEDIES.

As shown in the opening brief, there is no warrant to manufacture a *Bivens* remedy for Pollard's claim, because he had adequate alternative remedies for the harms he alleges. *See* Pet. Br. 15-36; *see also* U.S. Br. 11. Nowhere in Pollard's brief does he argue that he lacked such remedies. Instead, he urges the Court to create a categorical *Bivens* remedy *regardless* of whether alternative remedies existed, because it would allegedly be too hard for courts to evaluate that issue case by case. That approach turns the Court's *Bivens* jurisprudence on its head. Inferring a *Bivens* remedy is an extraordinary exercise, and Pollard is therefore not entitled to one when he has not justified the need for it.

A. Pollard Is Not Entitled To A *Bivens* Remedy If He Had Adequate Alternative Remedies.

Pollard abandons a key justification for the Ninth Circuit's holding: that state law remedies can never be adequate alternatives to a *Bivens* action. *See* Pet. App. 35a. Pollard concedes, as he must, that "the Court has looked at state rather than federal alternative remedies in determining whether a *Bivens* action is appropriate." Resp. Br. 25. *See also id.* at 43 ("*Bivens* claims will lie in circumstances where state law would not provide a recovery").

Rather than argue that the existence of adequate state law remedies is irrelevant, Pollard asserts that the Court has not relied exclusively on that factor in prior *Bivens* cases. *See id.* at 11. But that is not surprising. In prior cases involving federal officials, the Court focused on alternative federal remedies because the plaintiffs had no state law remedies.[2] By contrast, in *Malesko*, which involved a private defendant, adequate alternative state remedies existed, and the Court squarely relied on that factor in declining to infer a *Bivens* remedy. *See Malesko*,

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2 The *Carlson*, *Davis*, and *Bivens* plaintiffs had no state remedies. *See* Pet. Br. 15-19. The defendants in *Bush* v. *Lucas* were absolutely immune from the plaintiff's state law claim. 462 U.S. at 371. In the two military cases, the "*Feres*" doctrine apparently barred ordinary tort claims. *See United States* v. *Stanley*, 483 U.S. 669, 672 (1987); *Chappell* v. *Wallace*, 462 U.S. 296, 298 (1983). In *Schweiker* v. *Chilicky*, 487 U.S. 412, 425 (1988), the plaintiff's injuries would "go unredressed" absent a *Bivens* claim, which the Court nonetheless denied. *See also id.* at 429 n.3 (statute precluded non-constitutional claims). And since enactment of the Westfall Act in 1988, all non-constitutional tort claims against government employees have been expressly preempted. *See* Pet. Br. 41-42.

534 U.S. at 72-73; *id.* at 79 (Stevens, J., dissenting) (noting that the Court "relies so heavily * * * on [the] assumption that alternative effective remedies—primarily negligence actions in state court—are available to respondent"); Pet. Br. 20.

Pollard attempts to sweep *Malesko* under the rug by noting that the Court also relied on the "asymmetrical liability" inherent in subjecting private entities to suit where public entities cannot be liable. 534 U.S. at 72. Asymmetrical liability concerns are also present here, justifying the same result. *See infra* at 21-23. But regardless, *Malesko* stressed that the Court has inferred *Bivens* actions *only* when a cause of action against individual federal officers was "otherwise nonexistent" or the plaintiff "lacked *any alternative remedy*," and stated that "[w]here such circumstances are not present, we have consistently rejected invitations to extend *Bivens*." 534 U.S. at 70 (emphasis in original).

In *Malesko*, the existence of adequate alternative state law remedies "ma[de] respondent's situation altogether different from *Bivens*." *Id.* at 73. Pollard's own arguments show why that issue is similarly dispositive in this case. In his view, "[o]nly where a state remedy would provide significant deterrence is the need for a *Bivens* action less pressing." Resp. Br. 25. But if state law provides adequate recovery for a plaintiff's injuries, the existence of that remedy provides the requisite deterrence. Pollard has not shown, because he cannot, that his available state law remedies are inadequate to redress, and thus deter, the allegedly wrongful conduct of which he complains. Even under his own formulation of the law, there is no warrant to extend *Bivens* in this case.

B. Pollard Identifies No State Law Denying Recovery For Conduct That Violates The Eighth Amendment.

In *Malesko*, the Court held that the plaintiff had adequate alternative state law remedies, because he alleged "no more than a quintessential claim of negligence" and "the heightened 'deliberate indifference' standard of Eighth Amendment liability would make it considerably more difficult for respondent to prevail than on a theory of ordinary negligence." 534 U.S. at 73 (citations omitted). *Malesko*, moreover, involved circumstances strikingly similar to this case. Whereas Pollard alleges, *inter alia*, that petitioners failed to accommodate his injuries by providing alternative access to food and bathing facilities, *Malesko* involved similar allegations by a prisoner in private custody that his jailers failed to accommodate his injuries by allowing access to an elevator.[3]

Pollard has not shown why *Malesko*'s holding does not apply here. To show inadequacy of alternative remedies, it is not sufficient for him to assert that he might have lost on the merits of state law claims. Rather, he would have to show that state law denies him a cause of action as a matter of law even though his factual allegations (assuming their truth) satisfy the onerous Eighth Amendment liability standards. Far from doing so, Pollard has identified no principle of California law—or any other state's law—that has

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[3] Pollard does not dispute that these and his other allegations would state claims for basic medical negligence. *See also* U.S. Br. 21-22. Indeed, Pollard asserts that the person responsible for failing to provide alternative access to the cafeteria and bathing facilities was the prison's "Health Services Administrator," who "was responsible for overseeing his medical needs." Resp. Br. 3.

ever denied a cause of action to a prisoner who could prove harm from a jailer's negligent conduct, much less the willful or malicious conduct required to state an Eighth Amendment violation.

As the Court recognized in *Malesko*, the basic cause of action for negligence embodied in the law of California (and every other state) makes actionable all the conduct of which Pollard complains. Pet. Br. 26. Indeed, California law is especially protective of prisoners in both governmental and private facilities, imposing a duty to protect them from all foreseeable harm. *Id.* at 26-27 (discussing *Giraldo* v. *Cal. Dep't of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371 (Cal. Ct. App. 2008) and *Lawson* v. *Superior Ct.*, 103 Cal. Rptr. 3d 834 (Cal. Ct. App. 2010)). Moreover, as Pollard does not dispute, federal law prohibits prisoner *Bivens* claims that do not involve physical harm (such as damages claims for the denial of necessities), whereas California law has no such restriction. *See* Pet. Br. 30.

Rather than deny that alternative remedies exist, Pollard speculates—without foundation—that such remedies are "doubtful," "conjectural," or "uncertain." *See, e.g.*, Resp. Br. 1, 5, 24. That is so, he says, because some future court in some hypothetical case might deny a prisoner a basic negligence cause of action under some unspecified theory of legal duty not yet developed or applied, *id.* at 33, or because the law might change, *id.* at 23. Moreover, he dismisses the even broader duty recognized in California because *Giraldo* was issued relatively recently by an appellate court supposedly "having no authority over the law applicable in Taft, California," and involved different factual allegations from his case. *Id.* at 34.

Baseless speculation cannot satisfy Pollard's burden to show that inadequacy of traditional remedies necessitates a judicially-created federal remedy. The question is not whether a specific reported decision has irrevocably found liability on precisely the same facts as this case. If that were so, this Court could never have held in *Malesko* and other *Bivens* cases that plaintiffs had adequate alternative state or federal remedies, because no two cases ever have identical facts and the law might always change.

Rather, the question is whether no other cause of action allows recovery where federal constitutional rights are violated. Saying that state courts can decline to recognize new duties based on broad factors, *id.* at 33, is no answer. Pollard cites no principle of California law that ever has denied, or ever would deny, the traditional negligence remedy to someone injured by "deliberate indifference to serious medical needs" that "constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976) (citation omitted).

Pollard's assertion that the *Giraldo* court has "no authority over the law applicable in Taft, California," Resp. Br. 34, misstates California law. Decisions of every Division of the California Court of Appeal are binding on all trial courts throughout the entire state. *See Auto Equity Sales, Inc.* v. *Superior Ct.*, 20 Cal. Rptr. 321, 324 (Cal. 1962). And regardless of when or by what court it was issued, *Giraldo* did not purport to change California law but instead followed long-settled legal principles. Nor is the decision irrelevant because its facts differ from this one. Resp. Br. 34. The *Giraldo* court applied a legal

standard even *more* protective of prisoners than ordinary negligence, in a case where *other prisoners* had inflicted the harm. That only underscores the availability of a remedy in the more typical circumstances of this case.

Not only has Pollard failed to show that he lacked alternative remedies on the facts of his own case, but neither he nor his amici identify any law from *any* state denying a cause of action to a prisoner injured by jailer conduct that would violate the Eighth Amendment. The opening brief cited 25 cases from other jurisdictions, and authorities that collect nearly 100 more, Pet. Br. 33 n.6, all of which recognize state law duties of care owed by jailers to prisoners. Pollard neither distinguishes any of those authorities nor cites a contrary case. Resp. Br. 35-36. Instead, he asserts that state laws are "divergent and ever-changing," *id.* at 36, without explaining how such unspecified divergence ever has abrogated, or ever would abrogate, a bedrock negligence cause of action in the kind of egregious circumstances implicated by the Eighth Amendment.

The closest Pollard's amici get to such an argument is the assertion that some states (but not California) have a procedural rule requiring a plaintiff alleging medical negligence to procure a supporting declaration. *See* ACLU Br. 30-32. If a plaintiff in another case is subject to such a statute, he could attempt to show that it renders state remedies inadequate. But the argument has failed when it has been raised. *See Alba* v. *Montford*, 517 F.3d 1249, 1255 (11th Cir. 2008). These procedural requirements merely place all plaintiffs on equal footing, and for plaintiffs subjected to willful or malicious conduct that violates the Eighth

Amendment compliance with such rules is not onerous. In any event, as the United States explains—and Pollard concedes—even if an alternative remedy does not provide complete relief, its deterrent effect still renders a *Bivens* remedy unnecessary. *See* Pet. Br. 19, 23; U.S. Br. 24-25; Resp. Br. 39 ("Adequate deterrence does not require that each violation be met with 'complete relief'").

Rather than identify any state denying a cause of action for conduct violative of the Eighth Amendment, Pollard and his amici complain that some states have limited reported case law on prisoner claims. *See, e.g.*, Resp. Br. 22; ACLU Br. 22-24.[4] That is immaterial, particularly given the egregious conduct required to state an Eighth Amendment violation. For example, in *Hui* v. *Castaneda*, 130 S. Ct. 1845, 1850 n.3 (2010), the Federal government *conceded* liability under California state law (as incorporated in the FTCA) and after this Court denied a *Bivens* remedy, the plaintiffs prevailed on state law claims in California state court, securing a verdict for more than $1,700,000. *See* Bob Egelko, *$1.7 Million Verdict for Inmate's Untreated Cancer*, S.F. Chronicle, Nov. 12, 2010, at C-4.[5] Reported decisions are not needed to show that the traditional negligence cause of action exists in such circumstances. The point was obvious

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[4] The ACLU brief cites several state statutes that provide FTCA-type immunity to state government prison employees. *Id.* at 22-23. On their face, however, these statutes do not cover claims by federal prisoners in privately-managed facilities.

[5] This belies the Government of Mexico's assertion that immigration detainees—like the decedent in *Hui*—have no adequate state law remedies. *See* Mexico Amicus Br. 3.

to the Court in *Malesko*, and there is no reason for a different holding here.

C. Courts Are Competent To Determine The Adequacy of Alternative Remedies.

One of Pollard's chief contentions is that the Court must create a "categorical" cause of action because it is too difficult for courts to determine that issue. Resp. Br. 21-24. That argument directly contradicts precedent.

Wilkie held that before authorizing a *Bivens* remedy courts must determine whether there is "any alternative, existing process for protecting the [plaintiff's] interest." *Wilkie*, 551 U.S. at 550. The Court had no difficulty conducting that analysis in *Malesko*—which involved a prisoner in a privately-managed facility—or in cases involving alternative federal remedies. And other courts commonly determine adequacy of alternative remedies in various contexts, including this one. *See* Pet. Br. 36 & n.7. The issue lies comfortably within the judiciary's competence.

Belying his own argument, Pollard *concedes* that "[o]f course, in any given case, a federal court could hold that a state remedy did not exist for a particular Eighth Amendment violation." Resp. Br. 38 n.10. That concession is not saved by his assertion that this result "could only occur if the Court here adopted a case-by-case approach," which he claims would be "both unprecedented and inadvisable." *Id.* The opposite is true. As Pollard admits, courts can, and regularly do, determine adequacy of alternative remedies in particular factual contexts.

Pollard argues that having courts decide this issue before creating new *Bivens* rights would "needlessly

burden district courts" Resp. Br. 21. Again, the opposite is true. The real needless burden would be to create a new categorical federal right of action for all prisoners in private facilities without regard to whether they have adequate alternative remedies.

Pollard's "burden-on-the-courts" argument is also premised on the incorrect assumption that if the Court declines to create a new *Bivens* remedy here, all prisoners in private facilities will nonetheless continue to file *Bivens* actions, necessitating determinations about adequacy of alternative remedies in every future case. If this Court holds that prisoners must press damages claims through available traditional remedies, that is what they will do. Prisoners, even where *pro se*, can understand their basic legal rights. *Cf. Bounds* v. *Smith*, 430 U.S. 817, 826-27 (1977). Meanwhile, federal courts will remain open to actions for injunctive relief to remedy any systemic, ongoing constitutional violations. *See* Pet. Br. 34-35. Only in the most extraordinary circumstances—and Pollard has not shown that any exist—will a plaintiff conceivably have any reason to argue that a *Bivens* remedy is needed because traditional damages remedies are inadequate or non-existent.

As Pollard admits, Resp. Br. 38 n.10, if such an unusual case ever arises courts are readily capable of resolving the issue. Pollard notes that *pro se* prisoner complaints are subject to pre-screening (as this one was), *id.* at 21, but that process requires dismissal only when a complaint fails to state a claim on its face. Moreover, a prisoner may appeal dismissal of a *Bivens* claim, as Pollard did here, all

the way to this Court if necessary.[6] Tellingly, while Pollard complains that other prisoners will improperly be subjected to summary dismissals, he is still unable to carry his own burden by identifying any flaws in the dismissal order in this case, even after plenary briefing to this Court.

At bottom, Pollard would have this Court reverse its presumption in *Bivens* cases. The Court has held that *Bivens* remedies are "disfavored," *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1948 (2009), and cannot be authorized if there is any cause even for "hesitation," *Wilkie*, 551 U.S. at 550. Pollard, however, would have the Court presume the availability of a new categorical federal cause of action based on the hypothetical possibility that state remedies might be inadequate in some unknown case for reasons yet to be explained. *Cf.* Resp. Br. 39 n.11 (arguing that Court should not "shift the burden to *Pollard*" to show inadequacy of alternative remedies). Pollard also complains that "state tort law pertaining to prisoners' rights is not well-developed" because such issues "have long been enforced through federal, rather than state, causes of action." *Id.* at 22. The existence of the traditional tort of negligence has been settled for centuries. But if basic tort law has become needlessly federalized with regard to other kinds of prisoners, that is no reason to displace state remedies in this context as well.

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[6] Thus, while this Court cannot review a state court dismissal of state law claims on the merits, Resp. Br. 37, federal court review would always be available for any determination that a putative *Bivens* plaintiff lacks adequate state law remedies.

III. PETITIONERS' STATUS AS PRIVATE EMPLOYEES GIVES RISE TO FACTORS COUNSELING HESITATION.

A. Congress Has Treated Government Employees Differently From Employees Of Government Contractors.

Pollard argues that there are no factors counseling hesitation in part because Congress has "affirmed *Bivens*" in the Westfall Act by "expressly preserv[ing] constitutional torts against individual officers." Resp. Br. 46. *See also id.* at 5 (noting that Congress "specifically approved" *Bivens* actions). According to Pollard, this action shows that "Congress is fully aware of the Court's *Bivens* jurisprudence in the Eighth Amendment context and has signaled no intention to limit its scope." *Id.* at 7.

In fact, this action by Congress affirmatively dooms Pollard's argument. In the Westfall Act, Congress did affirm *Bivens* actions. *See Hui*, 130 S. Ct. at 1851. But it did so *only* for claims against employees "of the Government," 28 U.S.C. § 2679(b)(2), which "*does not include any contractor with the United States.*" 28 U.S.C. § 2671 (emphasis added). *See* Pet. Br. 41-42. Thus, the "scope" of *Bivens* actions preserved by Congress, Resp. Br. 7, includes only claims against actual government employees and expressly *excludes* the claims at issue in this case.

There is a clear reason why Congress excluded contractor employees from the scope of the *Bivens* actions it preserved. In the Westfall Act, Congress also expressly preempted all state law tort claims against actual government employees by making the FTCA remedy exclusive as to such claims. 28 U.S.C. § 2679(b)(1). This preemption, however, did *not*

cover claims against contractor employees, as Congress continued the longstanding deliberate exclusion of contractors from the scope of the FTCA. 28 U.S.C. § 2671. *See* Pet. Br. 42-43.

Thus, through the Westfall Act, Congress adopted the same understanding of *Bivens* that petitioners urge in this case. It expressly preserved *Bivens* claims against actual government employees because it had precluded all other damages remedies against them. But it did not include contractor employees in that provision because there was no similar need—the traditional remedies against them were not preempted and still exist. At a bare minimum, this disparate intent by Congress "counsels hesitation" and thus mandates reversal of the Ninth Circuit.

B. The Specter Of Asymmetrical Liability Counsels Hesitation.

Another factor counseling hesitation is the specter of "asymmetrical liability" as between petitioners and their governmental counterparts, *Malesko*, 534 U.S. at 72, due to petitioners' lack of a recognized immunity defense. Recognition of a new *Bivens* right would be inappropriate even without regard to this factor, given Congress's intent in the Westfall Act and the lack of any federal analog to 42 U.S.C. § 1983. But Pollard incorrectly contends that this factor has no bearing on this case. Resp. Br. 12-16.

In *Carlson*, the Court held that there were no factors counseling hesitation in that case in part because "qualified immunity * * * provides adequate protection" against the unnecessary burdens a new species of constitutional liability would impose on government workers. 446 U.S. at 19. It therefore follows that where, as here, defendants have no

recognized qualified immunity defense, that factor does counsel hesitation. If the defendants' immunity had been immaterial to the extension of *Bivens* in *Carlson*, the Court would not have employed that factor in its analysis.

Neither *Stanley*, 483 U.S. 669, nor *Hui*, 130 S. Ct. 1845, overruled *Carlson*'s reliance on this factor. In *Stanley*, the Court rejected the argument that a *Bivens* action can be precluded "only when our immunity decisions would absolutely foreclose a money judgment," such that the scope of the *Bivens* right would be "coextensive" with the scope of immunity. 483 U.S. at 684-85. The Court held that the "special factors" limitation on *Bivens* actions would be "quite hollow if it does nothing but duplicate pre-existing immunity from suit." *Id.* at 686. In *Hui*, the Court considered the "separate question" of statutory immunity from *Bivens* claims, rather than whether a *Bivens* right existed in the first place. 130 S. Ct. at 1852.

Petitioners do not argue that the scope of a *Bivens* right is coextensive with qualified immunity in this or any other case, and this case presents no question of express statutory immunity as in *Hui*. Rather, petitioners rely on the asymmetry in subjecting them to greater potential liability than is faced by their governmental counterparts. *Stanley* rejected a new *Bivens* right because the limitations on *Bivens* actions are *broader* than the scope of qualified immunity. Although the two concepts are not coextensive, nothing in *Stanley* or *Hui* holds that immunity concerns can never inform the separate "special factors" component of the *Bivens* analysis. Indeed, *Carlson* employed just such an analysis.

Moreover, the relevant asymmetry is between different categories of *Bivens* defendants rather than between federal and state defendants. Pollard argues that if a *Bivens* remedy is denied here, federal prisoners in private facilities would lack a constitutional damages claim afforded prisoners in state custody. *See* Resp. Br. 8, 13 n.4. But that distinction is the result of *Congress's* action in providing a statutory remedy in the latter case but not the former. The *Bivens* doctrine is not coextensive with Section 1983; indeed, if it were, the Court would never withhold a *Bivens* remedy for any constitutional claim.

Here, creating a new federal remedy would expose employees of private contractors to greater liability than is faced by actual government employees, who have qualified immunity from constitutional claims and who are not subject at all to state law claims. The Court should not impose, by judicial fiat, greater liability on a new category of private defendants than Congress has elected to impose on their governmental counterparts. The imposition of such asymmetrical liability "is a question for Congress, not [the Court], to decide." *Malesko*, 534 U.S. at 72.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 10-1104

In the Supreme Court of the United States

MARGARET MINNECI, ET AL., PETITIONERS

v.

RICHARD LEE POLLARD, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Court should imply a cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against individual employees of private companies that contract with the federal government to provide prison services, where the plaintiff has adequate alternative remedies for the harm alleged and the defendants have no employment or contractual relationship with the government. Pet. i.

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VII

Statutory Authority to Contract with the Private Sector for Secure Facilities, 16 Op. Off. Legal Counsel 65 (1992) 2

In the Supreme Court of the United States

No. 10-1104

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v.

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BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether employees of a private corporation operating a correctional facility for federal prisoners under contract with the Bureau of Prisons (BOP) are subject to an implied damages action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Congress has authorized the Attorney General, acting through BOP, to contract with private entities to house federal prisoners. *E.g.*, National Capital Revitalization and Self- Government Improvement Act of 1997 (1997 Act), Pub. L. No. 105-33, Subtit. C, § 11201(c), 111 Stat. 734 (secure facilities); 42 U.S.C. 13901(b) (halfway houses). Like the BOP, the Department of Homeland Security, United

States Marshals Service, Office of Refugee Resettlement, Bureau of Indian Affairs, and Office of the Federal Detention Trustee also contract with private firms for detention services. *E.g.*, 18 U.S.C. 4013; see Pet. 29 n.10. The United States has an interest in the extent to which the employees of the entities with which it contracts are exposed to liability under *Bivens* for their allegedly unconstitutional conduct, as well as in ensuring proper deterrence of and appropriate remedies for such conduct.

STATEMENT

1. Private organizations have long played a role in the operation of correctional facilities. As this Court has observed, "[p]rivate individuals operated local jails in the 18th century," and "private contractors were heavily involved in prison management during the 19th century." *Richardson* v. *McKnight*, 521 U.S. 399, 405 (1997) (citations omitted). Congress has authorized BOP to contract with private entities to operate secure correctional facilities and halfway houses (now called "Residential Reentry Centers") for federal prisoners. *E.g.*, 1997 Act, 111 Stat. 734; 42 U.S.C. 13901(b); see 18 U.S.C. 3621(b) ("[BOP] may designate any available penal or correctional facility that meets minimum standards of health and habitability established by [BOP], whether maintained by the Federal Government or otherwise."); *Statutory Authority to Contract with the Private Sector for Secure Facilities*, 16 Op. Off. Legal Counsel 65 (1992) (recognizing BOP's contracting authority). There are currently 13 privately run secure facilities housing more than 25,000 federal prisoners and numerous privately run halfway houses holding almost 9000 more. BOP, *Weekly Population Report*

(July 21, 2011), http://www.bop.gov/locations/weekly_report.jsp#contract.

2. The claims at issue in this case arose at the Taft Correctional Institution (TCI) in Kern County, California, a privately operated secure facility owned by the government. The GEO Group, Inc. (GEO), formerly known as Wackenhut Corrections Corporation (see Pet. App. 15a n.2), operated TCI under contract with BOP from 1997 to 2007.

TCI, like all BOP contract facilities, operates subject to an extensive set of performance requirements and ongoing BOP monitoring to ensure "a safe, humane and appropriately secure facility" that "assist[s] offenders in becoming law-abiding citizens." BOP, *TCI Statement of Work* at 4 (1997) (Statement of Work).[1] BOP requires that "[a]ll services and programs shall comply with * * * the U.S. Constitution; all applicable Federal, state and local laws and regulations; applicable Presidential Executive Orders (E.O.); all applicable case law; and Court Orders." *Id.* at 7. Through the State-

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[1] A new Statement of Work, which contains substantially similar language in relevant respects, became effective when BOP changed contractors at TCI in 2007. See TCI Contract Solicitation 1, Section C: Statement of Work (2006), http://www.fbo.gov/index?s=opportunity&mode=form&id=8bb9f7c87f3a2b1bd148664889b6ff6ab&tab=core&_cview=1.

BOP's Residential Reentry Centers, all of which are now operated by private contractors, are governed by similar standards and inspection requirements. See BOP, *Statement of Work for Residential Reentry Center* (2007), http://www.bop.gov/business/res_reentry_ctr_sow_2010.pdf; BOP, *Community Corrections Manual* §§ 4.5.5 to 4.5.14 (1999) http://www.bop.gov/policy/progstat/7300_009.pdf; see also Gov't Br. 4, *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61 (2001) (describing performance and monitoring requirements for BOP's privately operated halfway houses).

ment of Work, BOP specifies compliance standards for a variety of subjects including contractor personnel (*id.* at 10-18), safety and emergency procedures (*id.* at 31-32), inmate discipline and rights (*id.* at 32), social services (*id.* at 37), inmate labor (*id.* at 37-39), and inmate health care (*id.* at 33-37). With respect to health care in particular, BOP provides that "the contractor shall adhere to all applicable Federal, state and local laws and regulations governing the delivery of health services" and that "[t]he provision of medical services commensurate to the level of care available in the community is an essential component of successful performance under the contract." *Id.* at 34. BOP places its own personnel onsite to monitor contractor compliance with the terms of the Statement of Work, and maintains the right to conduct inspections of any part of the institution at any time. *Id.* at 4, 7.

BOP also utilizes a Quality Assurance Plan for secure facilities to ensure contractor compliance with the Statement of Work, BOP policies, and applicable law and regulations. See BOP, *Contract Facility Quality Assurance Plan* at 1-2 (2010) (Plan); see also BOP, *Program Statement 7740.01: Oversight of Private Sector Secure Correctional Facilities* (2000), http://www.bop.gov/DataSource/execute/dsPolicyLoc. The Plan identifies "vital functions" for successful implementation of the core requirements of the contract. The Plan then sets forth detailed monitoring requirements for BOP to assess contractor performance of each function through a regular inspection process. Plan at 1-2. With respect to health services, for example, the Plan requires BOP to review medical records, observe delivery of patient care, interview health-care personnel, conduct inventories, review staffing patterns, and inspect facilities. *Id.* at 23-

39. The Plan also requires BOP review of inmate grievances for denial of medical services and review of the underlying medical records. *Id.* at 37-38.[2]

3. a. Respondent, a federal inmate, was incarcerated at TCI in 2001 and 2002. Pet. App. 15a. Respondent alleges that during that period, he slipped on a cart left in a doorway, injured himself, and was examined by the prison's medical staff. Medical staff diagnosed him with possible fractures of both elbows, placed him in a bilateral sling, and referred him to an orthopedic clinic outside the prison for further evaluation. *Ibid.*; J.A. 30-31.

Respondent alleges that, before leaving the prison for his clinic visit, one of the officers (a GEO employee) forced him to wear a prison jumpsuit despite respondent's protest that putting his arms through the sleeves of the jumpsuit was extremely painful. Respondent also alleges that he was forced to wear a "black box" mechanical restraint device on his wrists during his transport and clinic visit, despite his complaints that wearing the device caused him severe pain. J.A. 31-32; Pet. App. 15a.

According to respondent, the orthopedist at the clinic diagnosed serious injuries to his elbows and recommended that his left elbow be put into a posterior splint

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[2] Federal prisoners housed in privately operated secure facilities also have restricted access to BOP's administrative remedy program (see 28 C.F.R. 542.10-542.18). Complaints from such prisoners may be appealed to BOP if they involve certain issues such as classification, designation, sentence computation, reduction in sentence, removal or disallowance of good-conduct time, confiscation of inmate property, or issues directly involving BOP staff. See Statement of Work at 32; Michael B. Cooksey & Christopher Erlewine, *BOP Memorandum for Regional Directors re: Implementation of Administrative Remedy Program—Contract Facilities* 2 (May 14, 2004).

for approximately two weeks. After returning to TCI, respondent was told that his elbow would not be put into a posterior splint because of limitations in staffing and facilities. J.A. 32-33. Respondent alleges that prison medical personnel also failed to provide other necessary care, such as nerve conduction studies and physical therapy, resulting in continuing impairment. J.A. 39-43. Respondent further alleges that he was unable to eat, bathe, or sleep properly due to the pain from his injuries; that he was required to return to work before his injuries had healed; and that he was forced to wear the "black box" restraint again when returning for a follow-up clinic appointment. J.A. 33-37; Pet. App. 15a-16a.

b. Respondent filed a *pro se* complaint alleging Eighth Amendment violations and seeking money damages (which the courts below construed as claims under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)). J.A. 38-46; Pet. App. 16a.[4] The first amended complaint names Wackenhut Corrections Corporation (now GEO) and eight individuals as defendants. The five individual defendants who remain in the case—all employees of GEO at the time of respondent's incarceration—are petitioners before this Court. See *id.* at 17a n.6. Three petitioners were prison medical personnel, one was a security officer, and one was a food-services supervisor. J.A. 28-29.

The district court dismissed GEO from the suit based on the Court's holding in *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61 (2001), that private prison corporations are not subject to *Bivens* liability. Pet. App. 16a.

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[4] Respondent also brought a claim for intentional infliction of emotional distress based on the conduct alleged above. J.A. 47-48. Respondent did not appear to press that claim below, and neither the district court nor the court of appeals considered it separately.

The district court dismissed the individual GEO employees (including petitioners) as well, reasoning that they were not subject to *Bivens* liability because (1) they did not act under color of federal law; and (2) state law provided alternative damages remedies. *Id.* at 70a-72a, 73a-80a.

3. a. A divided panel of the court of appeals reversed in relevant part, holding that respondent's *Bivens* claims against petitioners could proceed. Pet. App. 14a-68a.[4]

As a threshold matter, the court of appeals held that petitioners had acted "under color of federal law" for *Bivens* purposes because their job duties served a "fundamentally governmental function." Pet. App. 29a, 31a; see *id.* at 22a-31a. Although the court noted that neither this Court nor the Ninth Circuit had decided whether employees of a private corporation operating a federal prison act under color of federal law, the court looked to principles developed in suits under 42 U.S.C. 1983 to determine whether a private entity has engaged in state action. The court relied in particular on *West* v. *Atkins*, 487 U.S. 42 (1988), in which this Court permitted a Section 1983 claim against a private doctor providing medical care to inmates in state prison. Pet. App. 23a-26a. Finding "no principled basis to distinguish the activities of the GEO employees in this case," the Court concluded that petitioners had acted under color of federal law. *Id.* at 26a, 31a.

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[4] The court of appeals noted that it was unclear whether respondent had appealed the dismissal of GEO itself. Pet. App. 16a n.5. In any event, as the court of appeals held, this Court's decision in *Malesko*, *supra*, forecloses a *Bivens* suit against GEO. *Ibid.* The court of appeals thus affirmed the district court's dismissal with respect to GEO, and that issue is not before this Court. *Ibid.*; see Br. in Opp. 3 n.2.

Applying the two-part test articulated in *Wilkie* v. *Robbins*, 551 U.S. 537 (2007), the court of appeals held that *Bivens* should be extended to create an implied private damages remedy against petitioners. Pet. App. 31a-52a. First, the court concluded that the fact that respondent could obtain redress under state tort law did not "amount[] to a convincing reason[] for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* at 37a (quoting *Wilkie*, 551 U.S. at 550). The court reasoned that the availability of alternative state-law remedies, unlike congressionally crafted remedies, does not raise separations-of-powers concerns that counsel against a judicially created *Bivens* remedy. *Id.* at 37a-39a. The court further reasoned that the need for uniform rules to govern liability for constitutional violations demands a federal remedy. *Id.* at 39a-41a.

Second, the court of appeals found no "special factors counselling hesitation" in the present context. Pet. App. 52a (quoting *Wilkie*, 551 U.S. at 575). The court took the view that it was feasible to create a uniform *Bivens* cause of action against employees of privately run prisons, whereas requiring courts to determine the availability of adequate state-law remedies in each case before deciding the viability of a *Bivens* claim was not. *Id.* at 42a-47a. The court also reasoned that, unlike in *Malesko*, see 534 U.S. at 69, extending *Bivens* to employees of private prison contractors would not undermine the core purpose of deterring individual officers from committing constitutional violations. Pet. App. 47a-51a. In reaching this result, the court recognized that an extension of *Bivens* would impose asymmetric liability costs on employees of privately run facilities as compared to government-run facilities (because federal employees

could claim qualified immunity). But the court noted that a contrary conclusion would also result in asymmetry. The court concluded that the prospect of asymmetric liability costs therefore "does not counsel hesitation in recognizing a *Bivens* remedy here," as it did in *Malesko*. *Id.* at 51a-52a.[5]

b. Judge Restani dissented in pertinent part. Pet. App. 52a-68a. Although she agreed with the majority that petitioners acted under color of federal law, Judge Restani disagreed with the majority's conclusion that they are subject to liability under *Bivens* where adequate state-law remedies exist. *Id.* at 52a-53a. Explaining that this Court has limited *Bivens* to cases in which no alternative remedy exists against the federal actor, Judge Restani concluded that the availability of alternative state tort remedies—including universally available remedies for negligence and medical malpractice—provided sufficient reason to refrain from implying a new damages remedy in this case. *Id.* at 53a-63a. Judge Restani also concluded that special factors counsel hesitation in the present context. She explained that state tort remedies generally are available for prison conduct that violates the Eighth Amendment; that state tort liability already deters unconstitutional conduct; and that extending *Bivens* in this context would permit a plaintiff

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[5] The court of appeals acknowledged that its decision created a conflict with at least two other circuits. Pet. App. 21a-22a (citing *Holly* v. *Scott*, 434 F.3d 287 (4th Cir.), cert. denied, 547 U.S. 1168 (2006); *Alba* v. *Montford*, 517 F.3d 1249 (11th Cir.), cert. denied, 129 S. Ct. 632 (2008)). The Tenth Circuit, in an opinion vacated by an equally divided en banc court, also declined to extend *Bivens* liability to the employees of a private corporation. See *Peoples* v. *CCA Det. Ctrs.*, 422 F.3d 1090 (2005), vacated in part on reh'g en banc., 449 F.3d 1097, cert. denied, 549 U.S. 1056, and 549 U.S. 1063 (2006).

to pursue both a *Bivens* action and a tort action against a private prison employee (who may not be entitled to qualified immunity), but only the former against a federal employee (who is entitled to qualified immunity). *Id.* at 63a-68a.

c. The Ninth Circuit denied a petition for rehearing en banc. Pet. App. 1a-14a. Eight judges dissented. In their view, the court had erred in "disregard[ing] the Supreme Court's narrowing instructions on *Bivens*, which have limited recognition of new *Bivens* actions to those situations where, for one reason or another, damages were unavailable under both state and federal law." *Id.* at 5a (Bea, J., dissenting from denial of rehearing en banc). In the dissenting judges' view, the court had "extend[ed] *Bivens* far beyond its carefully prescribed contours" by recognizing a "'freestanding' federal cause of action against private company employees where adequate, and arguably superior, state remedies are available." *Id.* at 13a-14a.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in recognizing a remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against employees of a private corporation operating a correctional facility for federal prisoners where a state-law remedy is available.

A. The Court has extended the implied damages action crafted in *Bivens* only twice, and not at all since 1980. In *Bivens*, as well as in the two other cases in which the Court implied a cause of action, the plaintiff lacked any other apparent remedy against the individual federal officer for the alleged constitutional violation. See *Bivens*, 403 U.S. at 394; *Davis* v. *Passman*, 442 U.S.

228, 245 (1979); *Carlson* v. *Green*, 446 U.S. 14, 18-23 (1980). Since *Carlson*, the Court has consistently declined to recognize a *Bivens* action where an alternative remedy exists, even if that remedy is not "equally effective" or does not provide "complete" relief.

B. The Ninth Circuit's decision in this case extends *Bivens* beyond existing precedent. Neither this Court nor any other court of appeals has permitted a *Bivens* action against individual employees of a federal contractor in a privately run prison, who, unlike their federally employed counterparts, are subject to liability under state law. The Ninth Circuit's extension of *Bivens* to this context is both unnecessary and unwarranted.

1. There is no reason to extend *Bivens* in this new context because the injuries respondent alleges are redressable under state law. The gravamen of respondent's complaint is medical malpractice and failure to provide related accommodations. The universal availability of a malpractice action is not in dispute, and California, like other States, also recognizes the availability of a negligence action based on breach of a jailer's duty of care to prisoners. See *Giraldo* v. *California Dep't of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371, 387-390 (Cal. Ct. App. 2008); see also *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 72-74 (2001) (relying on availability of state-law negligence claims for private prison employees' refusal to provide medication and use of elevator despite prisoner's heart condition). Indeed, in important respects, the state remedies available to respondent are superior to a *Bivens* remedy. State tort law imposes a lower standard of liability than the Eighth Amendment, and employees of private prison corporations generally do not enjoy the special immunities con-

ferred on government employees acting in the same capacity. *Id.* at 72-73.

It is likely that all of respondent's claims (to the extent they amount to constitutional violations) are redressable under state law, but even if they are not, this Court's precedents do not support implying a *Bivens* remedy merely because alternatives do not afford "complete" relief. *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983). Nor do this Court's cases require that alternative remedies be supplied by Congress. On the contrary, the availability of state remedies is directly relevant to assessing whether a *Bivens* remedy is necessary: state remedies ensure that some remedy is available to the plaintiff, and they deter unconstitutional conduct by state actors. Finally, the possibility that no state remedies might be available in other cases provides no reason to imply an additional *Bivens* remedy in this case, where adequate—and indeed, superior—state remedies were available.

2. Another factor counsels hesitation in the present context: extending *Bivens* would create a greater risk of liability for private prison employees compared to their governmental counterparts. Unlike federal government employees, who are covered by the Federal Tort Claims Act (FTCA) bar on non-constitutional claims, see 28 U.S.C. 2671, 2679(b)(1), employees of private contractors are subject to suit under state tort law. To imply an additional federal remedy, as respondent urges, would therefore subject employees of private prison contractors to a double dose of liability under state and federal law. To further complicate matters, under this Court's precedent, employees of federal contractors may well be found to lack the qualified immunity defense available to government employees in

Bivens suits. Federal prisoners in privately run facilities therefore would have a much greater likelihood of prevailing on a *Bivens* claim than their counterparts in government-run facilities. While asymmetries in the remedies available to prisoners in privately run facilities may be inevitable, whether those asymmetries warrant creation of an additional federal damages remedy is a matter that Congress should decide.

ARGUMENT

RESPONDENT IS NOT ENTITLED TO AN IMPLIED DAMAGES ACTION UNDER *BIVENS* AGAINST EMPLOYEES OF A PRIVATE ENTITY OPERATING A CORRECTIONAL FACILITY UNDER FEDERAL CONTRACT BASED ON INJURIES THAT ARE REDRESSABLE UNDER STATE LAW

The Ninth Circuit in this case extended the implied damages remedy recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to employees of a private corporation operating a correctional facility for federal prisoners. This Court should reject that novel and unwarranted expansion of *Bivens*, at least where, as here, alternative state tort remedies are available to the prisoner. Under these circumstances, there is no need to imply a federal-common-law damages remedy to redress respondent's alleged injuries or to deter unconstitutional conduct. Moreover, the Ninth Circuit's approach would expose private prison employees to a greater risk of liability compared to their governmental counterparts—a factor that counsels hesitation in the absence of congressional action.[6]

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[6] Petitioners do not ask this Court to review the court of appeals' determination that they acted under federal law, see Pet. Br. 37 n.8, and

A. This Court Exercises Great Caution In Considering Whether To Extend *Bivens* To Any New Context Or Class Of Defendants

1. In *Bivens*, the Court for the first time recognized an implied private action for damages against federal officers alleged to have violated constitutional rights.[7]

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the Court need not reach the issue to decide this case. See *Alba* v. *Montford*, 517 F.3d 1249, 1254 (11th Cir.) ("assuming, without deciding," federal action in holding that prisoner lacked *Bivens* remedy), cert. denied, 129 S. Ct. 632 (2008).

To the extent the Court considers the issue, however, the government submits that private prison contractors do act "under color of law" for certain purposes, including for purposes of federal criminal law. See 18 U.S.C. 242 (providing criminal penalties against any person who, "under color of any law," wilfully deprives any person of their rights under the Constitution or federal law). This Court has held that the phrase "under color of any law" in Section 242 "means the same thing" as the similar language of 42 U.S.C. 1983. *United States* v. *Price*, 383 U.S. 787, 794 n.7 (1966); see also *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 928 n.9 (1982). The Court has also held that a private physician working in a state prison under contract acts "under color of law" for purposes of Section 1983. See *West* v. *Atkins*, 487 U.S. 42, 54 (1988); cf. *Richardson* v. *McKnight*, 521 U.S. 399, 413 (1997) (remanding for determination of whether defendants, employees of a private prison contractor, were subject to suit under Section 1983). Taken together, those two lines of precedent establish the government's authority to enforce Section 242 against state and local prison contractors. See, *e.g.*, *United States* v. *Wallace*, 250 F.3d 738 (5th Cir. 2001) (Table) (per curiam) (rejecting claim that defendant, a guard employed by a private prison company, was not acting "under color of any law" within the meaning of Section 242). Because Section 242 does not differentiate between state and federal action, the same result obtains with respect to federal prison contractors.

[7] *Bivens* relied on earlier decisions recognizing implied causes of action for damages under federal statutes. See 403 U.S. at 397 (citing *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964)). Those decisions reflected an expansive view of the Court's authority to create causes of action

The *Bivens* Court held that federal officials could be sued for money damages for violating the plaintiff's Fourth Amendment rights by conducting a warrantless search of the plaintiff's home. In creating that common-law cause of action for damages, the Court noted that there were no apparent federal or state remedies available to redress the resulting injuries, as well as "no special factors counselling hesitation" in establishing a judicially fashioned remedy. *Bivens*, 403 U.S. at 389-390, 392-396; cf. *id.* at 409-410 (Harlan, J., concurring in the judgment) ("For people in Bivens' shoes, it is damages or nothing."). To the contrary, state laws regulating trespass and invasion of privacy could be "inconsistent or even hostile" to Fourth Amendment protections. *Id.* at 394.

Since *Bivens*, the Court has implied a *Bivens* remedy only twice. In *Davis* v. *Passman*, 442 U.S. 228 (1979), the Court recognized an implied damages action against a Congressman for alleged sex discrimination in violation of the Due Process Clause of the Fifth Amendment.

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to effectuate statutory goals, even absent any textual or structural basis for inferring that a right of action was intended. See, *e.g.*, *Borak*, 377 U.S. at 433 ("[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."). Since that time, however, the Court has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 n.3 (2001) (citing, *e.g.*, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15-16 (1979); *Cannon* v. *University of Chicago*, 441 U.S. 677, 688 (1979); *id.* at 717-718 (Rehnquist, J., concurring)). This Court has noted that it "'abandoned' the view of *Borak* decades ago, and ha[s] repeatedly declined to 'revert' to 'the understanding of private causes of action that held sway 40 years ago.'" *Ibid.* (quoting *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001)).

The Court did so "chiefly because the plaintiff lacked any other remedy for the alleged constitutional deprivation." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 (2001) (citing *Davis*, 442 U.S. at 245).

In *Carlson* v. *Green*, 446 U.S. 14 (1980), the Court permitted a *Bivens* action against individual federal prison officials for an alleged Eighth Amendment violation. The Court reasoned that plaintiff's sole alternative remedy—an FTCA claim against the United States—was insufficient to deter the unconstitutional acts of individual government employees. See *Malesko*, 534 U.S. at 68 (citing *Carlson*, 446 U.S. at 18-23). The Court also found it "crystal clear" that Congress intended the FTCA and *Bivens* to serve as "parallel" and "complementary" sources of liability. *Ibid.* (quoting *Carlson*, 446 U.S. at 19-20).

2. Since *Carlson*, the Court has "refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68; see also, *e.g.*, *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1948 (2009) ("Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability."). Notably, the Court has refused to extend *Bivens* even in the absence of express statutory preclusion of implied remedies and irrespective of whether any available alternative remedy would be "equally effective," *Carlson*, 446 U.S. at 19.

For example, in *Bush* v. *Lucas*, 462 U.S. 367 (1983), a federal agency employee claimed a First Amendment violation arising from a retaliatory demotion for his public statements critical of the agency. The Court refused to imply a *Bivens* remedy in light of the remedies available under the Civil Service Reform Act, even though the Act did not afford the employee damages for the constitutional violation beyond backpay and related re-

lief for the wrongful demotion. *Id.* at 388. The Court explained that the question whether a *Bivens* cause of action is available "obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff." *Id.* at 378, 388.

In *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), the Court declined to recognize a damages action against federal employees alleged to have violated due process in their handling of Social Security applications, even though the Social Security review scheme afforded only retroactive disability benefits and not damages for any constitutional harms. The Court found no support for "the notion that statutory violations caused by unconstitutional conduct necessarily require remedies in addition to the remedies provided generally for such statutory violations." *Id.* at 427; see *id.* at 421-422 ("The absence of statutory relief for a constitutional violation * * * does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation."). Notably, unlike in *Carlson*, the Court in *Chilicky* did not ask whether Congress has "explicitly declared" another remedy to be "equally effective." *Carlson*, 446 U.S. at 18-19. Rather, the Court concluded that the availability of a federal statutory remedy could preclude implying an additional *Bivens* remedy, even if the statutory remedy offered limited relief, unless Congress's failure to provide complete relief was "inadvertent." *Chilicky*, 487 U.S. at 423.

In *Malesko*, *supra*, the Court held that federal prisoners confined in facilities operated pursuant to a contract between a private company and BOP had no *Bivens* remedy against the company itself for alleged constitutional violations. The Court relied in part on the fact that such prisoners did not "lack effective reme-

dies." 534 U.S. at 72; see *ibid.* (noting "conce[ssion] at oral argument that alternative [state] remedies are at least as great, and in many respects greater, than anything that could be had under *Bivens*"). Specifically, the Court explained that the federal prisoners in privately run facilities could pursue state tort remedies (such as negligence), as well as federal administrative remedies and suits for injunctive relief. *Id.* at 73-74; see *id.* at 73 (contrasting plaintiff's situation from *Bivens*, "in which we found alternative state tort remedies to be 'inconsistent or even hostile' to a remedy inferred from the Fourth Amendment"). The *Malesko* Court also explained that *Chilicky* had "rejected the claim that a *Bivens* remedy should be implied simply for want of any other means for challenging a constitutional deprivation in federal court." *Id.* at 69 ("So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability.").

Finally, in *Wilkie* v. *Robbins*, 551 U.S. 537 (2007), the Court declined to create a *Bivens* remedy for Fourth and Fifth Amendment violations arising out of alleged retaliation by federal officials for a landowner's refusal to grant the government an easement. *Id.* at 551-562. The Court clarified the *Bivens* analysis by treating the inquiry from *Bush* and *Chilicky* as the first step in deciding whether a *Bivens* remedy is available: "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* at 550. The Court then identified a second step, noting that even "in the absence of an alternative [process or remedy], a *Bivens* remedy is a subject of judgment: 'the federal courts must make

the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.'" *Ibid.* (quoting *Bush*, 462 U.S. at 378). For the portion of the landowner's suit that alleged conduct actionable under state tort law, see *id.* at 551, the Court noted that "the tort or torts by Government employees would be so clearly actionable under the general law that it would furnish only the weakest argument for recognizing a generally available constitutional tort," *id.* at 560. See also *id.* at 551 (characterizing *Malesko* as a case "considering availability of state tort remedies in refusing to recognize a *Bivens* remedy").

In sum, the Court has declined to recognize a *Bivens* remedy both where alternate state remedies existed, see *Malesko*, 534 U.S. at 73-74; *Wilkie*, 551 U.S. at 551, and where alternate federal remedies existed, see *Chilicky*, 487 U.S. at 421-427; *Bush*, 462 U.S. at 388, even where those remedies did not provide the same kind or amount of damages the plaintiffs had sought for the alleged constitutional violations. Some four decades after *Bivens* was decided, it remains the case that this Court "ha[s] extended its holding only twice, to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct," *Malesko*, 534 U.S. at 70. Otherwise, the Court has "consistently rejected invitations to extend *Bivens*." *Ibid.*

B. Respondent's Suit Does Not Warrant An Extension Of *Bivens*

In concluding that a *Bivens* remedy is available in this case, the court below extended *Bivens* beyond existing precedent. Contrary to respondent's contention (Br. in Opp. 13), his action is not, "in all material respects, identical to that approved in *Carlson*." Most obviously, the defendants in *Carlson* were federal officials employed by the United States in a government-run prison, see 446 U.S. at 16 & n.1, whereas petitioners are individuals employed by a contractor in a privately run prison. That distinction is critical. As explained below (pp. 29-31, *infra*), whereas the FTCA precludes non-constitutional suits against federal officers, it affords no such protection to employees of private contractors. Moreover, whereas federal employees are generally entitled to the protections of qualified immunity, employees of private contractors (even those who might be considered federal actors for *Bivens* purposes, see note 6, *supra*) likely are not. To recognize a *Bivens* remedy in this case would thus require extending *Bivens* both to a new context and to a new class of defendants.[5] Tellingly, the

[5] Even apart from those material distinctions, respondent's heavy reliance on *Carlson* (Br. in Opp. 13-15) is misplaced. In *Carlson*, the Court appeared to presume that a *Bivens* remedy would be unavailable only if the defendants could (a) "show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective," or (b) "demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress.'" 446 U.S. at 18-19 (citation omitted). As explained above (pp. 16-19, *supra*), however, later cases have manifested a deep reluctance to extend *Bivens* unless no alternative remedy (even one not "equally effective") is available and no special factors counsel otherwise. See, *e.g.*, *Wilson* v. *Libby*, 535 F.3d 697, 708 (D.C. Cir. 2008) (noting that, "subsequent to *Carlson*, the Court clari-

court below stands alone in permitting a *Bivens* suit to proceed against private contractors in these circumstances. See *Malesko*, 534 U.S. at 65 (noting question not before the Court); *Holly* v. *Scott*, 434 F.3d 287 (4th Cir.) (rejecting *Bivens* remedy), cert. denied, 547 U.S. 1168 (2006); *Alba* v. *Montford*, 517 F.3d 1249 (11th Cir.) (same), cert. denied, 129 S. Ct. 632 (2008).[9]

Respondent's request to extend *Bivens* in this context fails at both steps of the analysis set forth in *Wilkie*. First, the gravamen of respondent's complaint is medical malpractice and breach of duties of care, and adequate state-law remedies are available for prisoner claims arising from those allegations. Second, the decision whether to create a federal damages remedy in this context, which threatens to expose private prison employees to greater liability than their government counterparts, is a decision Congress should make.

1. State law provides adequate alternative remedies

a. As respondent stated in the introduction to his amended complaint, this suit is designed "to obtain redress for deprivation of proper medical care." J.A. 27.

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fied that there does not need to be an equally effective alternate remedy" to preclude a *Bivens* action), cert. denied, 129 S. Ct. 2825 (2009).

[9] Consistent with the approach of the parties in *Malesko*, the United States (as an amicus) assumed *arguendo* that a *Bivens* remedy would be available against individual employees. See Gov't Br. 17, *Malesko*, *supra* ("[A]lthough this Court has never held that private individuals acting under color of federal authority may be held liable under *Bivens*, both respondent and petitioner appear to assume that such an extension would be proper. For present purposes, we assume such an extension of *Bivens* is proper as well."); see also Oral Arg. Tr. 19-20, *Malesko*, *supra*. The United States did not, as Justice Stevens stated in his dissent, "maintain[] that such liability would be appropriate." *Malesko*, 534 U.S. at 79 n.6.

Although respondent attempts to divide his Eighth Amendment claim into four sub-categories—"deni[al] [of] basic medical care" (Br. in Opp. 2); conditioning "access to medical care" on compliance with inmate-transport procedures causing pain (*id.* at 1); "deni[al] [of] basic access to food and hygiene" due to incapacitation from his injuries (*id.* at 2); and being "forced" to return to work duty prematurely (*ibid.*)—all of these alleged violations arise from respondent's central allegation that he was not provided adequate medical care or appropriate accommodations for his elbow injuries.

Most, if not all, of the wrongful conduct alleged in this case is redressable under state tort law. There is no dispute that a state tort remedy in medical malpractice would be available to a prisoner, like respondent, alleging deficient medical treatment of his injuries. Beyond that, California, like other states, recognizes that "jailers owe prisoners a duty of care to protect them from foreseeable harm." *Giraldo* v. *California Dep't of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371, 387 (Cal. Ct. App. 2008); see Br. in Op. 19 (acknowledging that California "tort law extends into the prison context") (citing *Giraldo*); see also Pet. App. 65a-67a (Restani, J., dissenting); Pet. Br. 33 n.6 (collecting state cases). Accordingly, even respondent's allegations of mistreatment by non-medical personnel may give rise to a negligence action. *Giraldo*, 85 Cal. Rptr. 3d at 390; see also Pet. App. 65a (Restani, J., dissenting). Moreover, respondent could also bring parallel tort claims against GEO, petitioners' employer, under a *respondeat superior* theory of liability. *Id.* at 57a n.1 (citing, *e.g.*, *Lisa M.* v. *Henry Mayo Newhall Mem'l Hosp.*, 907 P.2d 358, 360 (Cal. 1995)).

In *Malesko*, the Court emphasized that the prisoner, who alleged that private prison employees refused him

medication and use of an elevator despite knowledge of his heart condition (thereby resulting in a heart attack), had actionable tort claims for negligence or deliberate indifference. See 534 U.S. at 72-74 (noting that prisoner lacked an alternative tort remedy "due solely to strategic choice"). The Eighth Amendment-based allegations in *Malesko* are not meaningfully different from respondent's non-malpractice allegations here (*e.g.*, being forced to work or to wear a "black box" restraint despite his injuries). As in *Malesko*, alternative state tort remedies exist to redress the gravamen of respondent's complaint.[10]

b. Although this Court does not require alternate remedies to be "equally effective" as a *Bivens* remedy (see note 8, *supra*), from a plaintiff's perspective, the state tort remedies available here may well be superior to a *Bivens* remedy in important respects.

As this Court explained in *Malesko*, "the heightened 'deliberate indifference' standard of Eighth Amendment liability * * * make[s] it considerably more difficult * * * to prevail than on a theory of ordinary negligence." 534 U.S. at 73 (citing *Farmer* v. *Brennan*, 511 U.S. 825, 835 (1994) ("[D]eliberate indifference describes a state of mind more blameworthy than negligence.")); see also *Holly*, 434 F.3d at 295-296 (finding state medical malpractice remedy superior to *Bivens* remedy); *Alba*, 517 F.3d at 1253-1254 (same). Even the Ninth Circuit appeared to acknowledge that point in the decision below. Pet. App. 48a-49a ("It is true that * * *

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[10] Respondent argues that possible defenses (such as consent) to some of his allegations might render some state remedies effectively unavailable. Br. in Opp. 9-10, 20. Even putting aside the implausibility of such a defense under the circumstances alleged, this Court's precedents have never required "complete" relief for a plaintiff's injuries.

it may be easier to prevail on [a state tort] claim than on an Eighth Amendment *Bivens* claim. Indeed, in an action to recover damages for personal injuries under state tort theories such as negligence or medical malpractice, the plaintiff would not be required to prove deliberate indifference, as required to establish an Eighth Amendment violation."); see *id.* at 10a (Bea, J., dissenting from denial of rehearing en banc) (similar); *id.* at 56a-57a (Restani, J., dissenting) (similar).

Moreover, employees of private prison corporations likely do not enjoy the special immunities conferred on government employees acting in the same capacity, thereby further increasing the odds of an adverse damages judgment. See pp. 29-31, *infra*. Thus, respondent's "alternative remedies are at least as great, and in many respects greater, than anything that could be had under *Bivens*." *Malesko*, 534 U.S. at 72 (citation omitted).

For these reasons, the alternative tort remedies available in this context serve as an adequate deterrent—or at least as effective a deterrent as a *Bivens* action would be—to unconstitutional conduct. See *Malesko*, 534 U.S. at 70-71 (explaining that "[t]he purpose of *Bivens* is to deter individual federal officers from committing constitutional violations"). While it is conceivable that recognizing a *Bivens* action here might have some marginal deterrent effect in limited circumstances (see Pet. App. 49a-51a), the deterrence provided by existing tort remedies suffices to eliminate any need for a *Bivens* remedy in this case.

c. To the extent that respondent raises constitutional claims not in themselves redressable under state tort law, this Court's cases have rejected the proposition that there must be a perfect one-to-one correlation be-

tween each alleged constitutional harm and available remedies. The Court in *Chilicky*, for example, refused to recognize a *Bivens* remedy even though the alternative remedial scheme allowed for recovery only of past disability benefits erroneously denied, not separate damages for any due process violation accompanying that denial. See 487 U.S. at 421-422 ("The absence of statutory relief for a constitutional violation * * * does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation."); see also *Bush*, 462 U.S. at 388 (refusing to create a *Bivens* remedy even though the statutory remedies "do not provide complete relief for the plaintiff").

d. Contrary to respondent's contention (Br. in Opp. 15-16), neither *Bivens* nor any other decision of this Court holds that only federal remedies are relevant to the analysis. Although the Court has never expressly held that the availability of state-law remedies alone precludes implying a new *Bivens* remedy, the reasoning underlying the *Bivens* line of cases lends powerful support to that conclusion. In *Bivens* itself, the Court relied in significant part on the unavailability of a state-law remedy. See 403 U.S. at 394 (noting that trespass is not actionable against a defendant who "demands, and is granted, admission to another's house"); see also, *e.g.*, *Malesko*, 534 U.S. at 73 (in "*Bivens* * * * we found alternative state tort remedies to be 'inconsistent or even hostile' to a remedy inferred from the Fourth Amendment") (quoting *Bivens*, 403 U.S. at 393-394); *Alba*, 517 F.3d at 1254 ("[The Court] in *Bivens* itself expressed concern that Bivens could not recover damages against the federal narcotics agents under state tort law."). Moreover, in *Malesko*, this Court empha-

sized its unwillingness to extend *Bivens* except where a plaintiff lacks "*any* alternative remedy"—not just an alternative remedy under federal law—against the individual defendant. 534 U.S. at 70 (emphasis omitted); see *id.* at 72-74 (discussing alternative state-law remedies).[11]

Nor does a rule that limits the inquiry to federal remedies comport with the primary purposes underlying the *Bivens* remedy: (1) ensuring some remedy for the violation of a plaintiff's constitutional rights; and (2) deterring unconstitutional conduct by individual government actors. See, *e.g.*, *Bivens*, 403 U.S. at 397; *Malesko*, 534 U.S. at 70-71. An adequate alternative remedy serves both of those purposes, whether the remedy is under federal law or state law.

The court of appeals' emphasis on the need for a "uniform" remedy is similarly misplaced. Pet. App. 39a (quoting *Carlson*, 446 U.S. at 23). The Court has discussed the benefit of uniformity provided by a *Bivens* remedy only where (unlike here) a plaintiff has shown that no state remedy is otherwise available. In *Carlson*, for example, the plaintiff lacked an alternate remedy because the claims (at least in substantial part) did not survive the death of her son under the relevant state's survivorship law. 446 U.S. at 17-18 n.4, 24. Similarly, in

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[11] Respondent describes *Bivens* as holding that "a damages action for a Fourth Amendment violation existed 'regardless of whether [state law] . . . would prohibit or penalize the identical act.'" Br. in Opp. 16 (brackets in original). That is incorrect. The Court in *Bivens* stated that "*the Fourth Amendment operates as a limitation upon the exercise of federal power* regardless of whether [state law] would prohibit or penalize the identical act if engaged in by a private citizen." *Bivens*, 403 U.S. at 392 (emphasis added). The point concerns only the substantive scope of the Fourth Amendment; it says nothing about whether the existence of adequate state-law remedies would obviate the need for a judicially crafted damages action.

Bivens—where the uniformity concern surfaced only in Justice Harlan's concurrence, 403 U.S. at 409—the Court had noted the unavailability of a state tort remedy, *id.* at 394. And the Court's post-*Carlson* precedents do not emphasize uniformity, even where the primary alternative remedies would lie under state law. See, *e.g.*, *Malesko*, 534 U.S. at 72-74.

In any event, respondent "has not shown—because he cannot—that there is any state which does not provide recovery for that most fundamental tort claim, in which one person's negligent conduct causes physical and/or emotional harm to another." Pet. App. 11a (Bea, J., dissenting from denial of rehearing en banc); see *id.* at 62a ("[O]rdinary negligence and medical negligence causes of action are already universally available against employees of a private corporation operating a federal prison, and the elements of such common law derived causes of action are fundamentally the same in every state.") (Restani, J., dissenting). That states might have different procedural rules or limits on non-economic damages in such suits is hardly the kind of non-uniformity that would support recognition of a *Bivens* remedy, particularly given that an alternative remedy need not provide "complete" relief. *Bush*, 462 U.S. at 388; see pp. 16-17, *supra*.

e. Because state remedies are available to redress the sort of injuries respondent alleges, this case does not present the question whether a *Bivens* remedy should be made available against an employee of a federal prison contractor where there are no available state remedies[12] or where it is too difficult for a court to make

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[12] Because the Prison Litigation Reform Act of 1995 provides that "[n]o Federal civil action may be brought by a prisoner confined in a

that determination.[13] See Pet. App. 42a-46a. Were such a case to arise, the Court could consider whether the possibility of a federal-court suit for injunctive relief provides an adequate alternative to *Bivens*. See *Malesko*, 534 U.S. at 74. However the Court were to resolve that issue in other cases, the availability of adequate state remedies in this case provides sufficient reason to reject any extension of *Bivens* here.

2. ***Extending Bivens would create greater liability exposure for private prison employees compared to their governmental counterparts***

a. Although the availability of adequate alternative remedies to redress respondent's injuries provides sufficient reason not to extend *Bivens* in this case, another factor counsels hesitation in this context: extending a *Bivens* remedy would result in greater remedies for federal prisoners in privately run facilities compared to those in government-run facilities, and hence greater exposure to individual liability for private employees compared to federal employees serving the same functions.

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jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury," 42 U.S.C. 1997e(e), the hypothetical Eighth Amendment violations that concerned the Ninth Circuit because they might not result in "physical harm" redressable under state law (Pet. App. 43a-44a) might not be redressable in a *Bivens* action for much the same reason.

[13] In most cases, as in this one, determining the potential availability of alternative state remedies will be relatively straightforward. And even where it is not, there is no reason to doubt courts' ability to resolve the issue. See, *e.g.*, *Wilkie*, 551 U.S. at 553-554 (examining "patchwork" of multiple sources of state and federal law).

In *Malesko*, the Court cited the potential for asymmetrical liability costs on private prison contractors as a reason not to extend *Bivens* to a federal prisoner in a privately run facility, given that a federal prisoner in a BOP facility could not bring the same claim. 534 U.S. at 71-72. Much as in *Malesko*, allowing a *Bivens* claims against employees of private prison contractors could lead to asymmetrical liability costs.

The asymmetry arises in part because of the FTCA, which provides a means for bringing a damages suit against the United States for torts committed by federal employees in the scope of their employment, see 28 U.S.C. 1346(b)(1), while expressly preempting all non-constitutional civil claims against individual federal employees for such torts, see 28 U.S.C. 2679(b)(1).[14] The FTCA excludes from its scope claims arising out of the conduct of employees of "any contractor with the United States." 28 U.S.C. 2671; see *Logue* v. *United States*, 412 U.S. 521, 526-527 (1973) (holding that FTCA excludes prison contractors). That statutory exclusion means that federal prisoners in contractor-operated facilities are able to bring state-law tort claims against individual employees, whereas their counterparts in government-run prisons are not. Under respondent's contemplated remedy, therefore, employees of a federal prison con-

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[11] Section 2679(b)(1) makes the FTCA damages remedy against the United States (28 U.S.C. 1346(b)(1)) the exclusive remedy for any injury "resulting from the negligent or wrongful act or omission" of any federal employee acting within the scope of his employment. 28 U.S.C. 2679(b)(1). The following paragraph of the statute, however, carves out *Bivens* claims from the FTCA's bar on individual suits. See 28 U.S.C. 2679(b)(2)(A) ("Paragraph (1) does not extend or apply to a civil action against an employee of the Government * * * which is brought for a violation of the Constitution.").

tractor would be subject to a double dose of liability under state and federal law.

The asymmetry also arises because of the uncertain application of the qualified immunity doctrine, which shields a government official from liability for certain conduct, even if unlawful, as long as that conduct does not violate clearly established law. *E.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). In *Richardson* v. *McKnight*, 521 U.S. 399 (1997), which involved an action under 42 U.S.C. 1983, the Court held that employees of a state prison contractor are not entitled to qualified immunity.[15] 521 U.S. at 412; but cf. *id.* at 413-414 (reserving question whether private defendants might be

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[15] That Section 1983 may provide a remedy to state prisoners against employees of private firms operating state prisons—a question left open in *Richardson*, 521 U.S. at 413—does not mean that a *Bivens* remedy must also be available in the federal context. The Court has instructed that, in order to effectuate congressional intent, the text of the statute should be read broadly. See *Lugar*, 457 U.S. at 934 (discussing the legislative history of the Civil Rights Act of 1871 and the authors' goal of ensuring broad protection); *Lake Country Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 399-400 & n.17 (1979) (noting that it is "well settled that § 1983 must be given a liberal construction" and citing legislative history). By contrast, *Bivens* is a judge-made remedy, and for decades this Court has made clear that courts must exercise caution in extending that remedy into any new context or to any new class of defendants. For that reason, Section 1983 and *Bivens* are not coextensive in their reach. For example, even though entity liability is well accepted under Section 1983, the Court has declined to recognize such liability in the *Bivens* context. Compare *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 690 (1978) (municipalities and local governments); *Lugar*, 457 U.S. at 936-937 (corporations), with *FDIC* v. *Meyer*, 510 U.S. 471 (1994) (federal agencies); *Malesko*, *supra* (BOP prison contractors). The material differences in source and scope between Section 1983 and *Bivens* undercuts the argument for a corresponding *Bivens* remedy here.

able to assert special "good-faith" defense). The logic of *Richardson* suggests that employees of federal prison contractors may also be found to lack a qualified immunity defense to any cognizable *Bivens* claim. To that extent, federal prisoners in a privately operated facility would have a much greater likelihood of prevailing on an otherwise identical *Bivens* claim than their counterparts in a government-run facility.[16]

b. Although the court of appeals expressed "concern[] about issuing a decision that will yield disparate rights and remedies among inmates in private and public prisons," Pet. App. 51a, it concluded that the concern "does not counsel hesitation in recognizing a *Bivens* remedy here" because a rule that would leave prisoners in private prisons with no means of vindicating their constitutional rights is "equally undesirable." *Id.* at 51a-52a. The latter concern is, however, unfounded. As demonstrated, respondent (and other similarly situated federal prisoners) are free to seek state tort remedies for injuries arising from allegedly unconstitutional conduct—even if those remedies do not separately compensate for the constitutional violation itself. See pp. 23-25, *supra*.

To be sure, an asymmetry in remedies will persist even if the Court declines to extend *Bivens* to the present context: federal prisoners in BOP-run facilities would have a *Bivens* remedy while those in contractor-run facilities would not. But the point of *Malesko* is that

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[16] The lack of a qualified immunity defense also removes a premise of the Court's recognition of a *Bivens* action in *Carlson*, where the Court found no factor counseling hesitation because "even if requiring [petitioners] to defend respondent's suit might inhibit their efforts to perform their official duties, * * * qualified immunity * * * provides adequate protection." 446 U.S. at 19.

it should be up to Congress, and not the courts, to decide whether to resolve the asymmetry in favor of creating an additional federal damages remedy. That is especially true where, as here, creating such a remedy could increase contracting costs for the federal government. See *Malesko*, 534 U.S. at 72 ("Whether it makes sense to impose asymmetrical liability costs on private prison facilities alone is a question for Congress, not us, to decide."); see also *Wilkie*, 551 U.S. at 562 ("'Congress is in a far better position than a court to evaluate the impact of a new species of litigation' against those who act on the public's behalf.") (quoting *Bush*, 462 U.S. at 389).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 2011

APPENDIX

1. 28 U.S.C. 1346 provides in pertinent part:

United States as defendant

* * * * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

2. 28 U.S.C. 2671 provides:

Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United

States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

3. 28 U.S.C. 2679 provides in pertinent part:

Exclusiveness of remedy

* * * * *

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive

of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

* * * * *

AMICUS CURIAE BRIEF

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No. 10-1104

In the Supreme Court of the United States

MARGARET MINNECI, ET AL.,

Petitioners,

v.

RICHARD LEE POLLARD, ET AL.,

Respondents.

On Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, THE LEGAL AID SOCIETY OF NEW YORK, AND THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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Interest Of *Amici Curiae*

The American Civil Liberties Union is a nationwide, non-profit, non-partisan organization with over 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Throughout its 90-year history, the ACLU has been deeply involved in protecting the rights of prisoners, and in 1972 created the National Prison Project to further this work.

The Legal Aid Society of New York is a private, non-profit organization that has provided free legal assistance to indigent persons in New York City for over 125 years. Through its Prisoners' Rights Project, the Society seeks to ensure the protection of prisoners' constitutional and statutory rights through litigation and advocacy.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs is a non-profit public interest organization. Since 1989, its Prisoners' Project has engaged in broad-based litigation seeking to improve overall conditions at correctional facilities wherever Washington, D.C. inmates are held. At least fifty percent of the District's felony prisoner population must be housed in private contract facilities. *See* Pub. L. No. 105-33, § 11201, 111 Stat. 712, 734–37 (1997).

Consistent with their institutional goals, these organizations have appeared before this Court and other state and federal courts in numerous cases involving the rights of prisoners. They have a vital

interest in the resolution of the question presented, because the availability of a constitutional damages remedy against employees of private federal prison contractors is of fundamental importance to the preservation of prisoners' constitutional rights.[1]

Summary Of Argument

I. Federal prisoners are increasingly held in facilities operated by private contractors. Conditions at such facilities are often sub-standard due to the contractors' financial incentives and inadequate government oversight. Confronted with greater risks than other federal prisoners, private prison inmates should enjoy access to uniform federal judicial relief, and not be left to the uncertainty of state tort relief.

II. The right of individual federal prisoners to seek relief under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for Eighth Amendment violations does not depend on the availability of state tort remedies. This Court has consistently recognized a *Bivens* remedy where the violation of constitutional rights arises from the individual exercise of federal

---

[1] The parties have provided blanket consents to the filing of *amicus* briefs. Pursuant to Rule 37.6, counsel for *amici curiae* states that no party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

authority and Congress has not precluded judicial relief; conversely, the Court has never held that state law remedies alone preclude the core *Bivens* claim that Pollard alleges.

Moreover, the case-by-case evaluation of state remedies that Petitioners propose would mire lower federal courts in a morass of unclear and varying state tort law. This uncertainty will force—and has already forced—federal courts to predict (in some cases, invent) state law applicable to federal prisoners. The task is further complicated because the federal courts will face this uncertainty at the initial screening of prisoner complaints required by the Prison Litigation Reform Act (PLRA). Accordingly, the evaluation of state law remedies will have to be made solely on the basis of the allegations of *pro se* prisoner complaints.

Furthermore, state tort law may not protect Eighth Amendment rights. Strict state procedural requirements—such as the certificate of merit required to state a medical malpractice claim in many jurisdictions—create further state-by-state variation in protection of prisoner rights. Ultimately, the uncertain patchwork of state remedies does not amount to the convincing reason necessary to deny Pollard's *Bivens* remedy. To the contrary, only recognition of Pollard's *Bivens* claim vindicates the core deterrence and uniformity interests *Bivens* is designed to protect.

Argument

I. The Federal Government's Increasing Reliance On The Private Prison Industry Places Prisoners At Increased Risk Of Injury and Neglect.

The federal Bureau of Prisons (BOP) increasingly relies on private prisons to incarcerate federal prisoners. Unfortunately, private prison facilities have every incentive to cut costs and maximize profit, even at the expense of institutional and public safety, through lower pay for correctional officers, limited training, and minimal staffing. Due in part to such incentives, private prison inmates face greater threats to health and safety than other incarcerated persons, and inadequate federal oversight compounds these dangers.

1. The number of prisoners incarcerated in private prisons has increased dramatically over the past two decades. In 1990, the BOP did not house any prisoners in for-profit institutions. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 1995, at iv (1997). By 1995, for-profit prisons held 1,018 federal inmates, and by 2009, the figure had grown 33-fold to 34,087 (approximately 16% of the total federal prison population, which stood at 208,118 by December 31, 2009). *Id.*; U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2009, at 2, 33 (2010). On a given day, private facilities also hold nearly half of all federal immigration detainees. *See* DETENTION WATCH NETWORK, THE INFLUENCE OF THE PRIVATE PRISON INDUSTRY IN IMMIGRATION

DETENTION (2011), *available at* http://www.detentionwatchnetwork.org/privateprisons (approximately 49% of the total detained population).

2. "[T]he private sector is a more dangerous place to be incarcerated." Curtis R. Blakely & Vic W. Bumphus, *Private and Public Sector Prisons — A Comparison of Select Characteristics*, 68 FED. PROBATION 27, 30 (2004). A U.S. Department of Justice study, based on a national survey of private prisons, reported that "privately operated facilities have a much higher rate of inmate-on-inmate and inmate-on-staff assaults and other disturbances" than comparable publicly operated facilities. JAMES AUSTIN & GARY COVENTRY, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, EMERGING ISSUES ON PRIVATIZED PRISONS 52 (2001). Another Department of Justice study comparing the private federal prison where Pollard was held, Taft Correctional Institution (TCI), with institutions operated by BOP, found: "TCI consistently demonstrated lower levels of performance on . . . inmate misconduct and illegal drug use." HARLEY G. LAPPIN, ET AL., U.S. DEP'T OF JUSTICE, EVALUATION OF THE TAFT DEMONSTRATION PROJECT: PERFORMANCE OF A PRIVATE-SECTOR PRISON AND THE BOP, at x (2005); *see also* Blakely & Bumphus, *supra*, at 29 (finding, based upon an analysis of national data, that "the private sector experienced more than twice the number of assaults against inmates than did the public sector").

Recent examples of unsafe conditions in private prisons include the following:

- In May 2011, the United States Attorney's Office for the Western District of Texas charged Donald Dunn, a private prison employee responsible for the transportation of immigration detainees, with sexually abusing female detainees on four separate occasions. Press Release, U.S. Dep't of Justice, Western District of Texas, *Former T. Don Hutto Correction Center Employee Faces Federal Charges* (May 12, 2011), http://www.justice.gov/usao/txw/press_releases/2011/Dunn_information.pdf. Dunn earlier pled guilty to state charges of official oppression and unlawful restraint in connection with the molestation of five detainees.

- In 2010, the Associated Press obtained video footage showing private prison guards standing idly by as a prisoner was mercilessly beaten: "[The victim] . . . manag[es] to bang on a prison guard-station window, pleading for help. Behind the glass, correctional officers look on, but no one intervenes when [the victim] is knocked unconscious." Rebecca Boone, *Prison Violence: At "Gladiator School," Help Never Comes*, SALT LAKE TRIB., Dec. 10, 2010.

- In 2009, State of Hawaii investigators sent to Otter Creek Correctional Center, a private prison for women in Kentucky that held Hawaii prisoners, found that "at least five corrections officials at the prison, including a chaplain, had been charged with having sex

with inmates in the last three years, and four were convicted." Ian Urbina, *Hawaii To Remove Inmates Over Abuse Charges*, N.Y. TIMES, Aug. 25, 2009.

- According to a 2007 Texas Youth Commission audit of a private facility for children, cells were "filthy, smelled of feces and urine," "there are serious problems with insects throughout the facility and grounds," "[t]here is racial segregation on the dorms," and youth reported that they have "not received church services in over two months." TEXAS YOUTH COMMISSION, COKE COUNTY JUVENILE JUSTICE CENTER AUDIT, at 4–9 (2007), http://www.tyc.state.tx.us/news/tyc_cokecounty_auditreport.pdf.

3. As compared to public facilities, private prisons pay correctional officers less, face a higher rate of staff turnover, employ staff with less training, and provide fewer correctional officers per inmate. Blakely & Bumphus, *supra*, at 29. In turn, "pay, training, and turnover may all contribute to the higher levels of violence seen in the private sector." *Id.* at 30; *see also* AUSTIN & COVENTRY, *supra*, at 52 ("[T]he number of staff assigned to private facilities is approximately 15 percent lower than the number of staff assigned to public facilities."); LAPPIN ET AL., *supra*, at 91 ("Most correctional professionals maintain that additional staff resources deter misconduct because additional staff provides greater surveillance."); SCOTT D. CAMP & GERALD G. GAES, FEDERAL BUREAU OF PRISONS, GROWTH AND QUALITY OF U.S. PRIVATE PRISONS: EVIDENCE FROM A

NATIONAL SURVEY 16 (2001) ("Privately operated prisons appear to have systemic problems in maintaining secure facilities. . . . Advocates of prison privatization have argued that private prisons can pay workers less, offer fewer benefits, and still deliver a product that is as good or better than that provided by the public sector. The evidence to date contradicts such an encompassing assertion.").

4. Private facilities housing federal prisoners and detainees are not subjected to adequate governmental oversight. Indeed, BOP has failed to hold private contractors accountable for their actions. For example, in 2003, the Justice Department's Civil Rights Division found that the Santa Fe Adult Correctional Detention Center, through Physicians Network Associates (PNA), "provides inadequate medical services in the following areas: intake, screening, and referral; acute care; emergent care; chronic and prenatal care; and medication administration and management. As a result, inmates at the Detention Center with serious medical needs are at risk for harm." Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to Jack Sullivan, County Commission Chairman 3 (Mar. 6, 2003), *available at* http://www.justice.gov/crt/about/spl/documents/santa_fe_findings.pdf (last visited Sept. 15, 2011). The letter further explained that inmates were not offered treatment for new, contagious tuberculosis infections. *See id.* at 6–7.

Despite these findings, BOP later *rewarded* PNA by entering into a contract to house federal prisoners at the Reeves County Detention Center (RCDC), a private prison in Texas where PNA provides medical

care. Predictably, PNA's history of medical neglect repeated itself at RCDC. Jesus Manuel Galindo, an RCDC prisoner who received insufficient medication despite suffering epileptic seizures while in solitary confinement, suffered a fatal seizure on December 12, 2008. Complaint at 1, *Galindo v. Reeves County, et al.*, No. 3:10-cv-00454 (W.D. Tex. Dec. 7, 2010). After the body was "removed from the prison in what looked to [other inmates] like a large black trash bag," prisoners rioted and set fire to the facility, complaining of inadequate medical care. Tom Barry, *A Death in Texas*, BOSTON REV, Nov-Dec. 2009, http://bostonreview.net/BR34.6/barry.php.

5. Further limiting oversight of private prisons is the fact that federal government contractors are not subject to the Freedom of Information Act (FOIA), a statute designed to enable "citizens to know 'what their Government is up to.'" *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171–72 (2004) (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989)). Federal entities that incarcerate people, such as BOP, undoubtedly qualify as "agenc[ies]" under FOIA; records in the custody of governmentally operated facilities are therefore subject to FOIA requests, enforceable through litigation in federal court.[2] By contrast, private

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[2] 5 U.S.C. § 552(a)(3)(A) ("[E]ach agency, upon any request for records . . . shall make the records promptly available to any person."); *Berry v. U.S. Dep't of Justice*, 733 F.2d 1343, 1344 (9th Cir. 1984) (stating that documents in BOP's possession are "agency records").

entities, such as for-profit prison companies, do not qualify as "agenc[ies]" under FOIA, and therefore are exempt from its disclosure requirements.[3]

* * *

In short, the explosive growth in the role of private contractors in federal prison management, with their incentives to cut costs and the absence of adequate oversight of their performance, has resulted in sub-standard security and medical care that makes federal prisoner access to uniform, effective judicial relief more important than ever.

II. Respondent's Right To Seek Relief Under *Bivens* Does Not Depend On The Existence Of State Tort Remedies.

"It is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bivens*, 403 U.S. at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946) (alteration in original)). Explaining that, "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty," *Bivens*, 403

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[3] 5 U.S.C. § 552(f)(1); (defining "agency" as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . ., or any independent regulatory agency").

U.S. at 395, *Bivens* "established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official." *Butz v. Economou*, 438 U.S. 478, 504 (1978).

Pollard's claim does not represent an extension of *Bivens*. His allegations of mistreatment while in federal custody fall comfortably within a "constitutionally protected interest" for which *Bivens* supplies a damage remedy. Contrary to Petitioners' suggestion, *see* Pet. Br. 21–36, this Court has never held that the potential availability of state tort remedies alone precludes a *Bivens* claim. *See* U.S. Br. 25. To do so in this case would mire federal courts in a morass of unclear and varying state tort law, and undermine federal prisoners' access to relief from the elevated dangers of private prisons.

A. This Court Has Never Denied A *Bivens* Claim On The Basis Of State Tort Remedies, And Doing So Would Be Contrary To The Rationale of This Court's *Bivens* Decisions.

Pollard's claim is at the core of the interests that *Bivens* and its progeny are designed to protect. Contrary to the United States' present assertion, *see* U.S. Br. 25, *Bivens*'s substantive reasoning and

jurisdictional basis foreclose reliance on non-federal remedies as a barrier to Pollard's *Bivens* claim.[4]

1. "To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care." *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011). Accordingly, the Eighth Amendment shields prisoners from "[a] prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate . . .," *Farmer v. Brennan*, 511 U.S. 825, 828 (1994), and imposes corresponding "duties on [prison] officials, who must provide humane conditions of confinement." *Id.* at 832.

Although this Court has expressed "caution toward extending *Bivens* remedies," *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001), Pollard's *Bivens* claim does not "extend" *Bivens* to a functionally "new context or category of defendants." Pet. Br. 13 (quoting *Ashcroft v. Iqbal*, 129 S. Ct.

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[4] In *Correctional Services Corporation v. Malesko*, 534 U.S. 61 (2001), the United States argued "[t]he same rationales that supported the creation of a *Bivens* remedy against federal employees—deterring individuals from engaging in unconstitutional conduct, and ensuring the availability of a remedy separate and apart from state tort law—support the recognition of such a remedy against private individuals who violate constitutional rights under color of federal law." Brief for the United States as Amicus Curiae Supporting Petitioner at 17 n.6, *Corr. Servs. Corp. v. Malesko*, No. 00-860 (May 2001) (internal citation omitted).

1937, 1948 (2009)). *See* Resp. Br. 6–12 (explaining that Pollard's "case is on all fours with *Carlson*"); *id.* at 40–49 (demonstrating that no "special factors" counsel against Pollard's claim). Instead, the GEO Group, Inc's (GEO) employees perform the same federal function as the BOP employees sued in *Carlson v. Green*, 446 U.S. 14 (1980)—the incarceration of citizens pursuant to the federal government's authority to punish federal crimes. *See* U.S. Br. 13 n.6 (conceding federal prison contractors are federal actors). Where the function and authority exercised by a contractor are identical to those exercised by the government, "[c]ontracting out prison [operation] . . . does not relieve the State of its constitutional duty . . . and it does not deprive . . . prisoners of the means to vindicate their Eighth Amendment rights." *West v. Atkins*, 487 U.S. 42, 56 (1988) (holding State's private contract physician operates under color of state law for purposes of 42 U.S.C. § 1983).[5]

2. This Court has never held that state remedies alone may preclude a *Bivens* remedy. To the contrary, limitations on *Bivens* have principally rested on the structural separation of powers.[6] This

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[5] This is equally true in the *Bivens* context. *See* Brief for the U.S., *supra* n.4, at 17 n.6 ("*Bivens* did not rest on the fact that the defendants there were formally employed by the United States; it rested on the fact that they exercised *federal power*." (emphasis in original)).

[6] The Court's *Bivens* jurisprudence demonstrates this central preoccupation with the judiciary's remedial authority in (continued...)

is because the federal courts' power to create (and adjudicate) *Bivens* claims is grounded in the congressional grant of jurisdiction in 28 U.S.C. § 1331. *See, e.g.*, *Bush v. Lucas*, 462 U.S. 367, 378 (1983) ("The federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation.").

a. *Bivens* identified several fundamental problems with relying on state tort law to vindicate individual constitutional interests violated through exercise of federal authority. First, the Court reasoned that the potential for abuse of federal authority requires a federal remedy. As the Court explained, the exercise of federal authority distorts the assumptions underlying state tort law because "[a]n agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual [tortfeasor] exercising no authority other than his own." *Bivens*,

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relation to Congress. *See, e.g.*, *Bivens*, 403 U.S. at 397; *id.* at 402, 403–04 (Harlan, J., concurring in the judgment), *id.* at 411–12 (Burger, C.J., dissenting); *Davis v. Passman*, 442 U.S. 228, 242–43, 248 (1979); *id.* at 249 (Burger, C.J., dissenting); *id.* at 253 (Powell, J., dissenting); *Carlson*, 446 U.S. at 18–23; *id.* at 27, 29 (Powell, J., concurring in the judgment); *id.* at 34 (Rehnquist, J., dissenting); *Bush*, 462 U.S. at 378, 379–88, 389; *id.* at 390 (Marshall, J., concurring); *Chappell v. Wallace*, 462 U.S. 296, 300–02, 304 (1983); *Schweiker v. Chilicky*, 487 U.S. 412, 423, 425–29 (1988); *Malesko*, 534 U.S. at 67 & n.3, 69 (discussing implied statutory causes of action); *Wilkie v. Robbins*, 551 U.S. 537, 554 (2007).

403 U.S. at 392. *See also id.* at 408–09 (Harlan, J., concurring in the judgment) (agreeing "that the types of harm which officials can inflict . . . are different from the types of harm private citizens inflict on one another"). Here, the exercise of intimidating federal power is even more overwhelming. *See, e.g., Johnson v. California*, 543 U.S. 499, 511 (2005) (recognizing that "the government's power is at its apex" "[i]n the prison context"). *See also Brown*, 131 S. Ct. at 1928. As in *Bivens*, Petitioners' reliance on state law "seek[s] to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when wrongfully used." *Bivens*, 403 U.S. at 391–92.

Moreover, *Bivens* suggests that state tort remedies are fundamentally problematic because they often under-protect federal rights, or conflict with federal authority in unacceptable ways. *Bivens*, 403 U.S. at 395 ("For just as state law may not authorize federal agents to violate the Fourth Amendment, neither may state law undertake to limit the extent to which federal authority can be exercised.") (internal citation and quotation marks omitted). "The inevitable consequence of this dual limitation on state power is that the federal question becomes . . . an independent claim both necessary and sufficient to make out the plaintiff's cause of action." *Id.*

Accordingly, where an officer violates a federal constitutional right through exercise of federal

authority, it is "entirely proper that these injuries be compensable according to uniform rules of federal law" rather than "the vagaries of common-law actions." *Id.* at 409 (Harlan, J., concurring in the judgment).[7] In *Carlson*, the Court applied this insight to federal prisoners' Eighth Amendment claims. *See* 446 U.S. at 23; *id.* at 28 n.1 (Powell, J., concurring in the judgment) ("Here, as in *Bivens* itself, a plaintiff denied his constitutional remedy would be remitted to the vagaries of state law.").

Petitioners' and the United States' reliance on Justice Harlan's observation that, "[f]or people in Bivens shoes, it is damages or nothing," *Bivens*, 403 U.S. at 410 (Harlan, J.); Pet. Br. 16; U.S. Br. 15, is misplaced. Far from intimating that a constitutional damages remedy depends upon an absence of state remedies, Justice Harlan's observation arose in a discussion of wholly federal remedies; specifically, whether federal courts can award damages as well as equitable relief under their general federal question jurisdiction. *See Bivens*, 403 U.S. at 409–10. Justice Harlan's statement simply made clear that Bivens could not, for practical reasons, rely on other federal remedies that might be available in other

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[7] Whether the remedy is created by Congress or the federal courts, it provides federal law uniformity. *See Bivens*, 403 U.S. at 392; *id.* at 409 (Harlan, J.); *Carlson*, 446 U.S. at 23, 24; *id.* at 28 n.1 (Powell, J., concurring in the judgment); *see also Chilicky*, 487 U.S. at 414, 428 (denying *Bivens* remedy where Congress provided a uniform, comprehensive remedial scheme); *Wallace*, 462 U.S. at 302 (same); *Bush*, 462 U.S. at 385 (same).

circumstances, such as the exclusionary rule (because he was not charged), or an injunction (because the invasion of his home had already occurred). *See id.* at 410. Justice Harlan's comment was not addressing state tort remedies, nor suggesting that such remedies, to the extent they exist, are an adequate substitute for constitutional damages under *Bivens*. In Justice Harlan's view, Bivens had no choice but damages vis-à-vis other federal remedies.[8]

b. State tort remedies have not played a significant role in the Court's recognition of *Bivens* claims. Although *Davis v. Passman*, 442 U.S. 228 (1979), noted the petitioner lacked a state remedy for her employment claim, the Court focused on the fact that federal "equitable relief . . . would be unavailing" against a former congressman under Title VII. 442 U.S. at 245 & n.23. Indeed, the Court suggested that, even if a state remedy had been

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[8] Although Bivens himself possessed potential causes of action in tort, which the Court recognized were likely to fail, *see Bivens*, 403 U.S. at 390, 394 (postulating trespass action and potential consent defense), the Court's recognition of Bivens's constitutional cause of action was not predicated on the likely defense to his potential state tort claim. Instead, the Court recognized the potential application of an equally powerful immunity defense to the constitutional tort on remand. *See id.* at 397–98 (district court found respondents enjoyed official immunity, but court of appeals did not consider immunity issue); *Camreta v. Greene*, 131 S. Ct. 2020, 2030–31 (2011) (federal employees may receive qualified immunity to *Bivens* claims).

available, it would have been insufficient to preclude a *Bivens* remedy, which was "particularly appropriate" for "the application of the [federal constitution] to a federal officer in the course of his federal duties." *Id.* at 245 n.23.

In *Carlson*, separation of powers dominated the Court's analysis, specifically whether Congress intended to preclude a constitutional damages remedy through the Federal Tort Claims Act (FTCA). *See* 446 U.S. at 18–23; *see also id.* at 27, 29 (Powell, J., concurring in the judgment) (cautioning against "denigrat[ing] the doctrine of separation of powers"). Notably, in assessing Congress' intent in the FTCA, which adopts state substantive law, the Court refused to consign "violations by federal officials of federal constitutional rights . . . to the vagaries of the laws of the several States. . . ." *Id.* at 23.

c. Even more notably, state remedies played no role in the Court's refusal to recognize a *Bivens* remedy in federal employee cases. In each instance, the Court relied on special congressional authority over the subject matter of the case or a comprehensive remedial scheme enacted by Congress. *See Schweiker v. Chilicky*, 487 U.S. 412, 414, 428 (1988) (relying on "comprehensive statutory schemes" covering Social Security claims); *United States v. Stanley*, 483 U.S. 669, 683–86 (1987) (unique structure of military discipline and justice, and plenary congressional authority over military); *Chappell v. Wallace*, 462 U.S. 296, 300–04 (1983) (same); *Bush*, 462 U.S. at 368, 385–88 (congressional action on federal employee claims, and resulting

"comprehensive procedural and substantive provisions").

d. *Malesko* similarly did not rely upon state remedies. The Court suggested that the existence of state tort remedies would not have been a barrier to a *Bivens* suit if it had been brought against named individuals rather than a private corporation operating a halfway house under contract with the BOP. *See* Resp. Br. 10–12. Likewise, the Court did not consider state tort remedies in concluding that corporate defendants could not generally be sued under *Bivens*. *See Malesko*, 534 U.S. at 63. Rather, such suits were inconsistent with *Bivens*'s "core premise," *id.* at 71, which the Court identified as "deter[ring] individual federal officers from committing constitutional violations," *id.* at 70. Indeed, the *Malesko* majority considered alternative remedies only in hypothesizing that, had the Court been "confronted with a situation in which claimants in respondent's shoes lack effective remedies," *id.* at 72, it might have found a "reason . . . to consider extending *Bivens* beyond [its] core premise." *Id.* at 71. The Court's search for exceptional circumstances in *Malesko* does not impact Pollard's claim, which vindicates *Bivens*'s "core premise" to deter *individuals* exercising federal authority. And, contrary to the United States' suggestion, U.S. Br.

19, *Wilkie v. Robbins*, 551 U.S. 537 (2007), also did not rest on the existence of state tort remedies.[9]

B. A Rule Requiring Federal Courts To Evaluate State Tort Remedies Prior To Adjudicating A *Bivens* Claim Would Impose Substantial And Unnecessary Burdens On Reviewing Courts.

In this case, the Petitioners argue that Pollard has no *Bivens* claim because his California tort remedies effectively address his constitutional injuries. If the Court decides the case on that ground, it will set the lower federal courts on an arduous case-by-case quest to evaluate the particular state remedies available against private prison employees for each federal prisoner's *Bivens* claim. *See* Pet. Br. 32 (demanding case-by-case review). Respondent correctly demonstrates that this Court prefers categorical evaluation of *Bivens* claims, rather than such a case-by-case inquiry. *See* Resp.

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[9] The principal shortcoming of the proposed Takings Clause claim in *Wilkie* rested on the "difficulty in defining a workable cause of action." *See* 551 U.S. at 555–56. While the Court reviewed potential alternative remedies, *see id.* at 551–54, it found "a patchwork, an assemblage of state and federal . . . regulations, statutes and common law rules" that neither required nor foreclosed a *Bivens* remedy, *id.* at 554. And, the Court tied this discussion to Congress' "expect[ations]," *id.*, suggesting that state remedies are relevant only insofar as they reflect a congressional choice. *See also* Resp. Br. 30; *Carlson*, 446 U.S. at 20 (noting FTCA adopted state tort law, and otherwise retained *Bivens*).

Br. 17–20. Amici supplement that point by demonstrating below the practical folly of Petitioners' case-by-case approach, which would impose a heavy burden on the lower federal courts, resulting in an uncertain and piecemeal intrusion into state tort law that counsels in favor of retaining Pollard's *Bivens* remedy.

Although Petitioners assert that Pollard's allegations of mistreatment sound in tort, *see* Resp. Br. 1–3, they provide a relatively shallow analysis of state law beyond California. *See* Pet. Br. 26–27, 33–34 & n.6. The remedial regimes in several of the thirteen states in which either GEO operates a federal facility or the BOP contracts with a private company to operate a federal prison facility[10] illustrate that denying Pollard's *Bivens* claim would mire lower federal courts in an uncertain morass of

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[10] California, Colorado, Florida, Georgia, Louisiana, Mississippi, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Texas, and Washington. *See, e.g.*, The GEO Group, Inc., North America Facility Locations, http://www.geogroup.com/locations_na.asp (last visited Sept. 16, 2011); Federal Bureau of Prisons, Maps of Facilities, Northeast Region, http://www.bop.gov/locations/maps/NER.jsp (last visited Sept. 16, 2011); *id.*, Mid-Atlantic Region, http://www.bop.gov/locations/maps/MXR.jsp (last visited Sept. 16, 2011); *id.*, Southeast Region, http://www.bop.gov/locations/maps/SER.jsp (last visited Sept. 16, 2011); *id.*, North Central Region, http://www.bop.gov/locations/maps/NCR.jsp (last visited Sept. 16, 2011); *id.*, South Central Region, http://www.bop.gov/locations/maps/SCR.jsp (last visited Sept. 16, 2011); *id.*, Western Region, http://www.bop.gov/locations/maps/WXR.jsp (last visited Sept. 16, 2011).

state law characterized by varying and variable remedies that may fail to protect indigent prisoners like Pollard.

1. Because several states have enacted remedial schemes that result in a lack of relevant substantive state law, federal courts may have little or no guidance in determining whether federal prisoners have effective remedies under state law. In effect, they will have to invent state tort law where there is none, and do so even for states that have arguably made public policy decisions that prisoners (at least those housed in state institutions) should have no tort law rights.

For example, the Mississippi Tort Claims Act (MTCA) "provides the exclusive remedy against a governmental entity or its employee for tortious acts or omission," *Carter v. Miss. Dep't of Corrs.*, 860 So. 2d 1187, 1191 (Miss. 2003), and immunizes the state, governmental entities, and employees acting in the course and scope of employment from liability "for any claim . . . [o]f any claimant who at the time the claim arises is an inmate of any . . . jail . . . or other such institution." MISS. CODE ANN. § 11-46-9(1)(m) (West 2011); *see also id.* § 11-46-1(g) (defining "[g]overnmental entity" to include the state). The MTCA has been applied strictly, "effectively cut[ting] off an inmate's right to bring a negligence action against the State or its employees." *Wallace v. Town of Raleigh*, 815 So. 2d 1203, 1208 (Miss. 2002) (quotation omitted). Although Mississippi inmates in both government and private prisons, may appeal administrative resolution of their claims in state courts, *see* Miss. Dep't of Corr., Administrative

Remedy Program, http://www.mdoc.state.ms.us/administrative_remedy_program.htm (last visited Sept. 16, 2011), the court's review is limited to determining whether the administrative decision was, *inter alia*, "arbitrary or capricious." *Clay v. Epps*, 19 So. 3d 743, 745 (Miss. Ct. App. 2008). As a result, there is little decisional law in Mississippi to guide a federal court in determining what tort remedies might be available to a state prisoner housed in a private prison facility.

At the other end of the spectrum, New York permits prisoner tort claims against the state but prohibits nearly all privately owned and operated state or local prison facilities, *see* N.Y. CORR. LAW § 121 (McKinney 2011), and claims against individual state prison employees, *see id.* § 24. *See also Haywood v. Drown*, 129 S. Ct. 2108 (2009) (recognizing that N.Y. CORR. LAW § 24 limits prisoners to circumscribed claims against the State, and holding provision unconstitutional as applied to § 1983 actions). The result is the same as in Mississippi: there is no state law guidance as to the application of tort rules to individual private prison employees for a federal court's *Bivens* review.[11]

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[11] Texas presents another variation on this theme. Because the Texas Tort Claims Act (TTCA) contains a very limited waiver of sovereign immunity, *see* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West 2011), many state cases reviewing prison conditions claims focus on the applicability of the TTCA's waiver provisions rather than the substance of relevant tort law. *See, e.g., Ramos v. Tex. Dep't of Crim. Just.-Corr. Inst. Div.*, No. 12-10-00397-CV, 2011 WL 3273468, at *3 (Tex. Ct. (continued...)

Thus, both the restrictive Mississippi and solicitous New York regimes would require a federal court to fill wide gaps in state law in order to evaluate (or adjudicate) a prisoner's claims.

Even where state remedial schemes do not hinder development of state decisional law, federal courts have already faced difficult state law issues involving private prisons. For example, federal courts in North Carolina have had to decide state law issues of first impression in cases brought by federal prisoners held in private prisons. *See Mathis v. GEO Group, Inc.*, No. 2:08-ct-21-D, at 29–33 (E.D.N.C. Nov. 9, 2009) (holding North Carolina's certificate of merit requirement applicable to claims for equitable relief, even though "[n]o North Carolina appellate court ha[d] addressed" that issue).

A case-by-case review would thus force a federal court to pass judgment on the effectiveness of state remedies, *see infra*, and make predictions about state law that may often prove incorrect. *See* Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1238 (2004) (describing "the potential [of federal court predictions of state law] to create a variety of problems, from the minor to the chaotic"). Such "[n]eedless decisions of state law should be avoided both as a matter of comity and

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App. July 29, 2011); *Davis v. Barnett*, No. 2-09-207-CV, 2010 WL 3075670, at *5 (Tex. Ct. App. Sept. 2, 2010).

to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966).

In addition, the likelihood that federal courts will incorrectly predict state law in assessing federal prisoners' *Bivens* claims threatens further consumption of federal judicial resources and dire practical consequences for federal prisoners' constitutional rights. Should a federal court conclude that state remedies preclude a *Bivens* claim, the court would have to determine whether it still had diversity jurisdiction—or another ground for federal question jurisdiction, *see* 28 U.S.C. § 1367—to consider the state tort claims. Diversity jurisdiction would not be uncommon for federal inmates regularly transferred around the country, *see* Resp. Br. 48 & n.15, because "the courts presume that the prisoner remains a citizen of the state where he was domiciled before his incarceration." *Hall v. Curran*, 599 F.3d 70, 72 (1st Cir. 2010). In that case, the federal court will face the gaps in state tort law, *see supra* pp. 22–24, a second time—in determining the merits of the prisoner's state tort claims. Absent diversity jurisdiction, however, the federal court may dismiss the federal prisoner's complaint, and the prisoner will have to re-file in state court. *See, e.g.*, 28 U.S.C. § 1915A(b). Should the state court determine, contrary to the federal court's conclusion, that the prisoner lacks an effective state cause of action, the federal prisoner will be left without any judicial relief for his constitutional injuries.

2. The federal court screening process prescribed by the PLRA compounds these problems. A federal court must screen prisoner complaints "before docketing, if feasible or, in any event, as soon as practicable after docketing." 28 U.S.C. § 1915A(a). Given this early review, a case-by-case inquiry would require a federal court to ascertain applicable state law, *see supra*, and assess its effectiveness, *see infra*, based solely upon a complaint likely aimed at a federal cause of action. The resulting absence of allegations regarding, *inter alia*, necessary elements of state claims—such as the certificate of merit required for state medical malpractice claims in many jurisdictions, *see infra* pp. 31–33—and information on state law defenses to the federal prisoner's potential tort claims, *see Bivens*, 403 U.S. at 394, heaps further uncertainty on a reviewing federal court and diminishes the practical feasibility of a case-by-case *Bivens* inquiry. *Cf. Whitfield v. Lawrence Corr. Ctr.*, No. 06-cv-968, 2008 WL 3874718, at *3 (S.D. Ill. Aug. 18, 2008) ("Often it is unclear exactly what a prisoner's claim is," but "[*p*]*ro se* complaints filed by prisoners are entitled to be liberally construed."). In this way, the prescreening procedure enacted by Congress in the PLRA—which applies to all prisoner litigation regarding conditions of confinement—provides a "special factor[] counseling hesitation." *Bivens*, 403 U.S. at 396–97. But, here, the "hesitation" supports Pollard's *Bivens* remedy rather than "counseling" against it.[12]

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[12] To be sure, a prisoner's allegations—and the applicability of (continued...)

3. Finally, state courts and legislatures can alter the substance of state remedies or the procedures governing them. *See, e.g.*, *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 202–03 (1989) (recognizing state control over tort law "through its courts and legislatures" and ability to "chang[e] the tort law of the State in accordance with the regular lawmaking process"); Resp. Br. 22–23, 34–35 (describing changes in California law via *Giraldo v. Cal. Dep't of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371 (Cal. Ct. App. 2008)). Consequently, a federal court's decision about one federal prisoner's access to state remedies may not apply to similar claims by subsequent prisoners.[13]

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state law—may become more clear if the case proceeds beyond the screening stage before the court determines the availability of a *Bivens* remedy. That solution, however, undermines "Congress's intent [in the PLRA] to conserve judicial resources by authorizing district courts to dismiss nonmeritorious prisoner complaints at an early stage." *O'Neal v. Price*, 531 F.3d 1146, 1153 (9th Cir. 2008). *See also Jones v. Bock*, 549 U.S. 199, 202 (2007) ("Among other reforms, the PLRA mandates early judicial screening of prisoner complaints. . . ."); *Id.* at 203 (noting Congress' goal in enacting the PLRA was "fewer and better prisoner suits").

[13] Indeed, states possess authority to alter the availability of state remedies in response to a federal court's review. *Cf. Bell v. Maryland*, 378 U.S. 226, 237–41 (1964) (remanding case to state court to consider supervening change in law affecting resolution of federal constitutional inquiry); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941) (holding federal courts sitting in diversity must apply state law even (continued...)

* * *

In sum, the United States' blithe contention that "there is no reason to doubt courts' ability to resolve" state remedial issues, U.S. Br. 28 n.13, fails to appreciate the substantive and practical complexities of the task it seeks to impose on the federal courts. Moreover, the judicial effort required to sort through these complexities undermines the PLRA's intended efficiencies. *See* 141 Cong. Rec. 26,553 (1995) (statement of Sen. Hatch) ("[The PLRA] will help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits."). State tort law thus fails to provide a "convincing reason for the Judicial Branch to refrain," *Wilkie*, 551 U.S. at 550, from recognizing an easily applied *Bivens* remedy for violation of federal prisoners' Eighth Amendment rights by individual employees of private federal prison contractors.

C. State Tort Law Does Not Provide Effective Relief For The Constitutional Violations Respondent Alleges Either In Theory Or In Fact.

Petitioners and the United States claim "Pollard's available state law remedies are superior to what he would have under *Bivens*." Pet. Br. 25. *See also* U.S. Br. 11. They largely base this contention on the simple difference between proving

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though state courts may change law "for the purpose of affecting former federal rulings").

negligence and "deliberate indifference." *See, e.g.*, Pet. Br. 2–3, 11, 28; U.S. Br. 11–12, 23. But that simple assumption rests on two faulty premises. First, that tort law and constitutional law protect the same interests. They do not. And second, that the procedural and substantive rules surrounding prisoner tort actions do not effectively foreclose relief in many states. They do. These limitations compound the uncertainty federal courts will face in case-by-case evaluations of the effectiveness of state remedies.[14]

1. As *Bivens* correctly recognized, state tort law is neither coextensive with an individual's constitutional rights nor is it designed to protect the same dignitary interests. *See supra* pp. 14–16; *Bivens*, 403 U.S. at 393–94; *Trop v. Dulles*, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."). Although "the wanton and unnecessary infliction of pain," *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981), may violate state tort law as well as the Eighth Amendment, the Eighth Amendment also

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[14] Petitioners' assertion that "[c]ourts are commonly called upon to determine the adequacy of alternative state and federal remedies," Pet. Br. 36, is unpersuasive. Petitioners rely upon cases limited to (1) the unique deference federal courts owe to state tax laws, *see Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 586–87 (1995); (2) pending state criminal proceedings, *see Younger v. Harris*, 401 U.S. 37, 41 (1971); and (3) standards governing procedural due process claims, *see, e.g.*, *O'Neill v. Baker*, 210 F.3d 41, 50 (1st Cir. 2000).

imposes affirmative obligations that may not have a counterpart in state tort law. This Court has made clear, for example, that prisons must "ensure that inmates receive adequate food, clothing, shelter, and medical care." *Farmer*, 511 U.S. at 832.[15]

Additionally, some "conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone . . . [as] when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise." *Wilson v. Seiter*, 501 U.S. 294, 304 (1991). And, at least with respect to excessive force claims, this Court has refused to dismiss complaints "based on the supposedly *de minimis* nature of [the prisoner's] injuries." *Wilkins v. Gaddy*, 130 S. Ct. 1175, 1180 (2010).

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[15] To be sure, some states housing private federal prisons impose general duties of reasonable care and inmate medical care on prisons. *See, e.g.*, *Giraldo*, 85 Cal. Rptr. 3d at 385–87; FLA. STAT. ANN. § 944.105 (West 2011); *State ex rel. Jackson v. Phelps*, 672 So. 2d 665, 667 (La. 1996); *Multiple Claimants v. N.C. Dep't of Health & Human Servs.*, 626 S.E.2d 666, 668 (N.C. Ct. App. 2006); *Williams v. Syed*, 782 A.2d 1090, 1093–94 (Pa. Commw. Ct. 2001); *Shea v. City of Spokane*, 562 P.2d 264, 267–68 (Wash. Ct. App. 1977), *aff'd*, 578 P.2d 42 (Wash. 1978). The abstract availability of a duty, however, does not ensure an effective or readily identifiable tort remedy. *See* Restatement (Second) of Torts § 314A(4); *supra* pp. 22–24 (describing dearth of relevant decisional law in some states).

These Eighth Amendment principles may well be relevant to Pollard's allegations of continued mistreatment. Yet, neither Petitioners nor the United States explain the applicability of basic negligence and medical malpractice standards to these kinds of Eighth Amendment violations, while they simultaneously insist that Pollard's Eighth Amendment claim must be dismissed because of the alleged applicability of state tort remedies. *See* Resp. Br. 31--32, 39 & n.11 (detailing lack of Eighth Amendment overlap with state tort law, and explaining Petitioners' attempt to force Pollard to "prov[e] a negative").

2. The United States broadly contends that "[t]he gravamen of [Pollard's] complaint is medical malpractice." U.S. Br. 11. Yet a federal court would need to disentangle various state procedural requirements that could render state relief unavailable in practice. Most significantly, medical malpractice claims face state pre-filing requirements of varying levels of strictness and degree. In light of the specialized standard of care involved, many states require claimants "to file with the complaint an affidavit of an expert, competent to testify, which . . . shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim," GA. CODE ANN. § 9-11-9.1(a) (West 2011), or some variation thereof.[16] While

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[16] *See* FLA. STAT. ANN. §§ 766.104, 766.203 (West 2011); MISS. CODE ANN. § 11-1-58 (West 2011); N.C. GEN. STAT. § 1A-1, Rule 9(j) (2011); N.Y. C.P.L.R. § 3012-a (McKinney 2011); Ohio Civ. (continued...)

many states apply the certificate of merit requirement to claims of *pro se* (including inmate) litigants,[17] several states do not.[18] A federal court

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R. 10(D)(2) (LexisNexis 2011). *See also* COLO. REV. STAT. ANN. § 13-20-602(1)(a) (West 2011) (requiring certificate of review "within sixty days after the service of the complaint"); Pa. R. Civ. P. 1042.3 (West 2011) (requiring certificate of merit "within sixty days after the filing of the complaint"); TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a), (b) (West 2011) (requiring expert report(s) "not later than the 120th day after the date the original petition was filed"). Florida requires the claimant's counsel to certify that prior to filing he or she has made "a reasonable investigation . . . to determine that there are grounds for a good faith belief that there has been negligence." FLA. STAT. ANN. § 766.104. Florida claimants must also "notify each prospective defendant by certified mail . . . of intent to initiate litigation for medical negligence." *Id.* § 766.106 (effective Oct. 1, 2011). Compliance with the Florida provisions is "a condition precedent to maintaining an action for malpractice" and therefore must be satisfied within the statute of limitations period. *Kukral v. Mekras*, 679 So. 2d 278, 283 (Fla. 1996) (citation and quotation omitted).

[17] *See, e.g., Cestnik v. Fed. Bureau of Prisons*, 84 F. App'x 51 (10th Cir. 2003) (applying Colorado law to dismiss *pro se* inmate's claim); *Whipple v. Warren Corr. Inst.*, No. 09AP-253, 2009 WL 2940240, at *3 (Ohio Ct. App. Sept. 10, 2009) (applying to *pro se* inmate); *McCool v. Dep't of Corrs.*, 984 A.2d 565, 571 & n.9 (Pa. Commw. Ct. 2009) (applying to *pro se* inmate); *Jefferson v. Univ. of Tex. Med. Branch Hosp. at Galveston*, No. 01-09-00062-CV, 2010 WL 987727, at *4 (Tex. App. Mar. 18, 2010) ("Indigent inmates are held to the same statutory requirements in health care liability claims as other citizens."). *See also James v. Goryl*, 462 So. 3d 1225, 1226 (Fla. Dist. Ct. App. 2011) (dismissing claim for failure to fulfill Florida pre-suit investigation requirement).

reviewing a federal inmate's *Bivens* claim will have to consider the proper application of these requirements in a variety of circumstances.[19] At the same time, the court must assess their practical effect on indigent prisoners who may be unable to engage a qualifying expert—either for a certificate of merit or at trial—while in custody,[20] and who may therefore be unable to vindicate their constitutional rights even through the indirect means provided by state tort law.

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[18] *See, e.g.*, MISS. CODE ANN. § 11-1-58(6) (West 2011); N.Y. C.P.L.R. § 3012-a(f) (McKinney 2011).

[19] For example, a federal court in North Carolina has held that private prisons are "health care providers" subject to the certificate of merit requirement, without citation to state decisional law on point. *See Hines v. GEO Group, Inc.*, No. 5:08-ct-3056-D, at 8–9 (E.D.N.C. Sept. 30, 2009); *see also Mathis*, No. 2:08-ct-21-D, at 33.

[20] For example, in Louisiana, the plaintiff has the burden of proving "the degree of care ordinarily exercised by physicians . . . in the state of Louisiana and actively practicing in a similar community or locale and under similar circumstances." LA. REV. STAT. ANN. § 9:2794(A)(1) (2011). Because a prisoner will generally need an expert to establish this special standard of care, the need for knowledge of "similar circumstances" suggests a prisoner would need to find an expert from among local prison physicians, a potentially significant impediment to finding an expert outside the prison in which the claimant is incarcerated (even with a Louisiana prisoner's right to subpoena an expert, *see id.* § 9:2794(B) (contemplating payment of a "fee" to the subpoenaed expert)).

Beyond these procedural barriers, substantive defenses may preclude federal prisoner claims in Pollard's situation. In Mississippi, for example, courts may consider the quality of the facilities available to a particular physician in assessing the extent of the duty of care in a medical malpractice claim. *See Hall v. Hilbun*, 466 So. 2d 856, 872 (Miss. 1985) (superseded by statute on other grounds). Because GEO employees refused to provide Pollard with a prescribed splint due to insufficient facilities and staff, *see* Joint Appendix 32–33, a medical malpractice claim by a federal prisoner in Mississippi may well be precluded under these circumstances. *Compare Harris v. Thigpen*, 941 F.2d 1495, 1509 (11th Cir. 1991) (holding that lack of resources "will not excuse the failure of correctional systems to maintain a certain minimum level of medical service necessary to avoid the imposition of cruel and unusual punishment").

Similarly, to the extent Pollard's claims regarding forced submission to a "black box" restraint and jumpsuit, *see* Resp. Br. 2, raise causes of action for battery or assault, *see, e.g.*, 18 PA. CONS. STAT. ANN. § 2701 (West 2011) (defining assault); *Caudle v. Betts*, 512 So. 2d 389, 391 (La. 1987) (defining battery), a federal court addressing those claims would need to consider, *inter alia*, whether consent offers a defense, *see Bivens*, 403 U.S. at 394 (noting consent defense), and whether a prisoner can voluntarily give consent. *See, e.g.*, *Munoz v. City of Union*, 16 Cal. Rptr. 3d 521, 545 (Cal. Ct. App. 2004) (recognizing police officers "need not be treated the same" as private citizens with respect to use of force);

Scott v. Gallagher, 209 S.W.3d 262, 267 (Tex. Ct. App. 2006) (recognizing correctional officers' "privilege to use force").

3. Finally, Petitioners' suggestion that consideration of state remedies beyond California is inappropriate, *see* Pet. Br. 23, 31–32, misses the mark. Reviewing state legal issues affecting Pollard's allegations in other relevant states illustrates the *methodological* shortcomings of the case-by-case regime Petitioners seek. In resolving the question whether damages are available to remedy Pollard's constitutional injury, such practical concerns are within the "policy considerations [this Court] may take into account," a class "at least as broad as the range . . . a legislature would consider with respect to an express statutory authorization. . . ." *Bivens*, 403 U.S. at 407 (Harlan, J., concurring in the judgment). *Cf. Bush*, 462 U.S. at 378 ("In the absence of . . . a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal. . . ."); *Wilkie*, 551 U.S. at 550.

These methodological problems also illustrate why reliance on state tort law undermines the fundamental federal interests in deterrence and uniformity underlying *Bivens*. Those interests provide a convincing reason to retain a federal prisoner's right to seek damages under the Eighth Amendment against individual employees of private federal prison contractors.

a. "[D]eterrence of individual officers who commit unconstitutional acts" is the "core premise" of

Bivens liability. *Malesko*, 534 U.S. at 71. Yet the reality of private prison management increases the need for individual deterrence due to inadequate government oversight and public transparency. *See supra* pp. 8–10. Moreover, the availability of *respondeat superior* under state tort law,[21] as a practical matter, undermines individual deterrence "[f]or if a corporate defendant is available for suit, claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury." *Malesko*, 534 U.S. at 71.[22]

b. Furthermore, relegating federal prisoners' constitutional claims to a welter of possible but often speculative state tort analogues creates in effect different constitutional regimes in each state housing a private federal prison. Prisoners will enjoy different remedies and prison employees will shoulder different obligations, simply based on the state of incarceration. *See supra*. In addition to this

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[21] *See, e.g.*, *Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*, 907 P.2d 358, 360 (Cal. 1995); *Colo. Dep't of Corr. v. Nieto*, 993 P.2d 493, 500–05 (Colo. 2000); *Weinstock v. Groth*, 629 So. 2d 835, 838 (Fla. 1993); *Dozier v. Clayton Cnty. Hosp. Auth.*, 424 S.E.2d 632, 634–36 (Ga. Ct. App. 1992); *Bleiler v. Bodnar*, 479 N.E.2d 230, 232–33 (N.Y. 1985).

[22] Notably, Mississippi's exclusive administrative system for prisoner claims, *see supra* pp. 22–23, may foreclose any state-law damage remedy to prisoners and thus further undermine individual deterrence. *See Clay*, 19 So. 3d at 744–46 (upholding administrative decision denying damages because MTCA precludes state tort claims).

interstate variation, because BOP employs both privately-operated and government-operated institutions in some states,[23] a prisoner's rights under a case-by-case inquiry also depend on whether BOP sends the federal prisoner to a privately or publicly operated facility in that particular state.

Where the agent, the underlying authority and the injured rights are federal, however, this Court has long concluded that a uniform remedy is appropriate. *See Carlson*, 446 U.S. at 24; *id.* at 28 n.1 (Powell, J., concurring in the judgment). "Certainly, there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers dependent on the State where the injury occurs." *Bivens*, 403 U.S. at 409 (Harlan, J., concurring in the judgment).[24] Instead, remitting federal prisoners to the varying remedies of state law allows the federal government to evade its Eighth Amendment obligations and federal prisoners' corresponding rights simply by "[c]ontracting out prison medical care." *West*, 487 U.S. at 56.

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[23] *See, e.g.*, Federal Bureau of Prisons, Maps of Facilities, Northeast Region, http://www.bop.gov/locations/maps/NER.jsp (showing intrastate variation in Pennsylvania and Ohio) (last visited Sept. 16, 2011).

[24] The United States' dismissal of the importance of uniformity, *see* U.S. Br. 26, rests on the question-begging (and erroneous) assumption that *Bivens* is available only where no state remedies exist. *See supra* 13–20.

Conclusion

The judgment of the court of appeals should be affirmed.

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AMICUS CURIAE BRIEF

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MARGARET MINNECI; JONATHAN E. AKANNO; ROBERT SPACK; BOB D. STIEFER; AND BECKY MANESS,

Petitioners,

v.

RICHARD LEE POLLARD, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF DRI AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI is an international organization that includes more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense lawyer, to improve the civil justice system, and to preserve the civil jury. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and – where national issues are involved – consistent.

To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues of import to its members, their clients, and to the judicial system. This is one such case.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* certifies that counsel of record for both petitioners and respondent have consented to this filing in correspondence on file with the Clerk's office.

SUMMARY OF ARGUMENT

In the proceedings below, a divided Ninth Circuit panel authorized *Bivens* damages against private prison employees for alleged constitutional violations. In so doing, the majority broke away from the decisions of two other Circuits, both of which declined to recognize *Bivens* damages under largely the same circumstances, as well as controlling Supreme Court authority. Although the majority's decision created a seismic rift in current *Bivens* jurisprudence, the Ninth Circuit nevertheless denied rehearing *en banc*, with several judges dissenting in a sharply worded opinion.

Petitioners' merits brief does an exemplary job of explaining why the majority's decision warrants reversal and DRI will not repeat those reasons here. Instead, DRI submits this *amicus curiae* brief to amplify the legal and practical consequences of the majority's decision, which favor reversal as well.

Because creation of private causes of action is better suited to the legislative process, this Court for the last thirty years has refused to extend *Bivens* beyond three limited circumstances – none of which are present in this case. But the Ninth Circuit majority's decision takes *Bivens* into uncharted territory by exposing private employees to an unprecedented form of personal liability. The ramifications of extending *Bivens* in this manner involve precisely the type of complex and competing policy and factual debate that is best suited for the legislative process. Yet, Congress

never has stated or implied any intent to create avenues for relief in these circumstances. By creating a cause of action in the absence of any indication from Congress that one should exist, the majority has substituted its own judgment for Congress's and thus overstepped its bounds.

Moreover, the Ninth Circuit majority set no measurable limits on the availability of *Bivens* damages in this setting, which means all other employees who work for private government contractors – and DRI's membership represents many of these companies – face an inchoate risk of personal liability. At the same time, the size and scope of the government's contracting operations has grown and will continue to grow sharply.

The upshot is twofold. First, the Ninth Circuit majority's opinion will result in an onslaught of lawsuits seeking *Bivens* damages. That is a hard pill to swallow in this era of soaring budget deficits, reduced public and private resources, and congested court dockets. It also may have a chilling effect on the initiative taken by private contractor employees on behalf of the government. In contrast, Congress is perfectly suited to fashion a more tailored remedy, if it chooses, that balances these factors. Second, private government contractors will be forced to increase their costs to account for defending, indemnifying, or insuring their employees against potential *Bivens* damages. Privatization thus will become more expensive for the government and, ultimately, for the taxpayer. Some might be willing to accept those

increased costs in light of the policies supporting the availability of a *Bivens* remedy against private contractor employees. Others may not be so willing. Regardless of where one falls along this spectrum, the point is that Congress – *not* the court system – is responsible for making this call.

The Ninth Circuit majority's decision should be reversed for these reasons as well.

ARGUMENT

A. The Ninth Circuit Majority Overstepped Established Separation Of Powers Principles

Creating "a private right of action is . . . better left to legislative judgment in the great majority of cases." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). This rule – rooted in fundamental separation of powers principles – has fueled the Court's *Bivens* jurisprudence for the past thirty years.

For instance, the Court in *Chappell v. Wallace* confronted whether enlisted military personnel could recover *Bivens* damages against individual officers for racial discrimination. 462 U.S. 296, 297-98 (1983). The Court unanimously refused to expand *Bivens* in this manner, explaining in part that "Congress, the constitutionally authorized source of authority over the military system of justice, has not provided a damage remedy for claims by military personnel that constitutional rights have been violated by superior

officers." *Id.* at 304. Thus, to the Court, "[a]ny action to provide judicial response by way of such a remedy would be plainly inconsistent with Congress' authority in this field." *Id.*

The Court reached a similar conclusion for similar reasons in *Bush v. Lucas*, 462 U.S. 367 (1983). There, an aerospace engineer sued the director of a federal space flight center for damages under *Bivens*, alleging he was demoted in retaliation for exercising First Amendment rights. *Id.* at 368-69. The Court recognized that the comprehensive statutory and regulatory scheme governing civil employee grievances was not as effective as a damages remedy in compensating the plaintiff for the harm suffered. *Id.* at 372. The Court also recognized that Congress had not expressly authorized or precluded the damages remedy the plaintiff had sought. *Id.* at 372-73. But to the Court, the adequacy or availability of legislative remedies was beside the point. Rather, the availability of *Bivens* damages turned on "a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for violations of employees' First Amendment rights." *Id.* at 388. As a practical matter, that analysis was for Congress and *not* the courts:

> In all events, Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service.

> Not only has Congress developed considerable familiarity with balancing governmental efficiency and the rights of employees, but it also may inform itself through fact-finding procedures such as hearings that are not available to courts. [*Id.* at 389.]

The Court repeated this refrain in *Schweicker v. Chilicky*, 487 U.S. 412 (1988). In that case, claimants who had their social security benefits terminated sued several agency officials for damages under *Bivens*. *Id.* at 417-18. Although the Court sympathized that the wrongful termination of disability benefits "must surely have gone beyond what anyone of normal sensibilities would wish to see imposed on innocent disabled citizens[,]" it nevertheless declined to authorize *Bivens* damages as a result. *Id.* at 428-29. The Court explained that Congress "has addressed the problems created by state agencies' wrongful termination of disability benefits" and deference to Congressional authority was warranted regardless of "[w]hether or not [the Court] believe[d] that its response was the best response." *Id.* at 429. As the Court put it, "Congress has discharged that responsibility to the extent that it affects the case before us, and we see no legal basis that would allow us to revise its decision." *Id.*

The same reasoning held sway in *FDIC v. Meyer*, where a discharged employee sued a federal agency for damages and alleged wrongful discharge in violation of due process. 510 U.S. 471, 473-74 (1994). The Court declined to permit *Bivens* damages against

federal agencies, in large part because of the "potentially enormous financial burden for the Federal Government" that such remedies would inflict. *Id.* at 486. The Court rejected the employee's argument that funds otherwise spent on indemnifying federal employees for *Bivens* damages could be shifted to cover agency liability, because "decisions involving federal fiscal policy are not ours to make." *Id.* (citations and internal quotations omitted). Rather, the Court would "leave it to Congress to weigh the implications of such a significant expansion of Government liability." *Id.*

And more recently, the separation of powers doctrine surfaced in *Wilkie v. Robbins*, where the Court declined to permit *Bivens* damages to a landowner who sued Bureau of Land Management employees. 551 U.S. 537, 560-62 (2007). The Court reiterated that "any damages remedy for actions by Government employees who push too hard for the Government's benefit may come better, if at all, through legislation." *Id.* at 562. Because Congress had more appropriate fact-finding procedures, it was "in a far better position" to evaluate the impact of new remedies "against those who act on the public's behalf." *Id.* Further, the Court observed, "Congress can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees." *Id.*

These separation of powers principles are the engine of the *Bivens* analysis, and they drove the Fourth Circuit to reject *Bivens* damages against

private prison employees. *Holly v. Scott*, 434 F.3d 287, 290 (4th Cir. 2006). In this regard, the Fourth Circuit explained:

> Congress possesses a variety of structural advantages that render it better suited for remedial determinations in cases such as this. Unconstrained by the factual circumstances in a particular case or controversy, Congress has a greater ability to evaluate the broader ramifications of a remedial scheme by holding hearings and soliciting the views of all interested parties. [citation] And by debating policies and passing statutes rather than deciding individual cases, Congress has increased latitude to implement potential safeguards – e.g., procedural protections or limits on liability – that may not be at issue in a particular dispute. [*Id.*]

The Fourth Circuit further explained that "neither the absence nor incompleteness of such a scheme represents an invitation for a court to step in to correct what it may perceive as an injustice toward an individual litigant." *Holly*, 434 F.3d at 290. To do so, according to the Fourth Circuit, "might well frustrate a clearly expressed congressional policy." *Id.*

It is impossible to reconcile this reasoning and these cases with the Ninth Circuit majority's decision here. In authorizing *Bivens* damages, the Ninth Circuit majority disregarded the absence of any express or implied intent by Congress to provide a remedy for constitutional violations by private prison employees. It failed to recognize not only the myriad

real-world consequences of authorizing *Bivens* damages in these circumstances, but also that Congress is best suited to evaluate whether these consequences are acceptable. Instead, the majority simply substituted its own judgment. This kind of judicial legislating is forbidden, particularly in the *Bivens* context. *See* discussion *supra* at 4-8 and cases cited; *see also U.S. v. Nat'l Treasury Employees Union*, 513 U.S. 454, 479 (1995) ("Our obligation to avoid judicial legislation also persuades us to reject the Government's second suggestion – that we modify the remedy by crafting a nexus requirement for the honoraria ban."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 394 n.100 (1982) ("It is just as much 'judicial legislation' for a court to withdraw a remedy which Congress expected to be continued as to improvise one that Congress never had in mind." (citation omitted)).

There is no practical reason to depart from these longstanding prohibitions against judicial legislation, either. The unifying thread among the only three decisions in which the Court has permitted the unlegislated *Bivens* remedy was that the plaintiff had *no* remedy at all to redress his or her grievance. *See Carlson v. Green*, 446 U.S. 14, 20, 25 (1980) (prisoner could sue public prison official; although Federal Tort Claims Act provided plaintiff with an alternative remedy against the United States, it provided no remedy against the individual who committed the constitutional violation); *Davis v. Passman*, 442 U.S. 228, 245 (1979) (employee of Congressman could

allege claims under the Fifth Amendment's equal protection clause for gender discrimination; plaintiff had no remedies under federal anti-discrimination statutes or state law); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 389 (1971) (federal agents who, under the color of federal authority, commit Fourth Amendment violations could be liable for civil damages; plaintiff could not sue federal officer under Section 1983).

But here, as petitioners explain, the individual tort regimes of the fifty states already provide prisoners with means of redressing their grievances through damages. In light of these available alternative remedial schemes, fashioning a *Bivens* remedy through judicial legislation is an unnecessary and unwarranted exercise.

The Ninth Circuit majority's attempt at judicial legislation is particularly troubling because it results in a leap of uncertain implications. Statutes that impose personal liability on persons who commit constitutional violations under the color of law were developed with the understanding that public employees assume certain official duties when accepting public employment, and thus are entitled to various privileges, immunities, and indemnity rights by virtue of their public employment. In the few instances in which it has authorized *Bivens* actions, the Court undoubtedly assumed that similar duties, privileges, immunities, and indemnity rights would apply to the federal officials subject to suit because those officials likewise were public employees. But

the extension of *Bivens* to private employees in this case takes a doctrine developed exclusively to apply to public officials and injects it into an arena – private employment – where the rules and underlying policies are different. *See* Pet.'s Brf. at 37-41.

Despite these differences, however, the Ninth Circuit majority simply pounded the square peg of *Bivens* into the round hole of private employee liability. But as the Court has said time and again, this kind of pounding should be left to the legislative process, where the consequences can be more fully explored. The Ninth Circuit majority's decision should be reversed for this reason as well.

B. The Ninth Circuit Majority's Decision Potentially Exposes Any Employee Of A Federal Contractor To Actions Seeking To Impose Personal *Bivens* Liability

The number of private employees performing what might be considered typical "government functions" – and who are thus potentially subject to *Bivens* damages under the Ninth Circuit majority's reasoning – has only increased over the past twenty years. *See* Laura A. Dickinson, *Public Law Values In A Privatized World*, 31 Yale J. Intl. L. 383, 383-84 (2006). The growth in privatization has touched not only the prison management sector, but also sectors such as health care, education, welfare and public benefit administration, foreign affairs, and security services. *See id.*; see also Richard Frankel, *Regulating*

Privatized Government Through § 1983, 76 U. Chi. L. Rev. 1449, 1451-52 (2009); Laura A. Dickinson, *Government For Hire: Privatizing Foreign Affairs And The Problem Of Accountability Under International Law*, 47 Wm. & Mary L. Rev. 135, 137-38 (2005). In the welfare sector alone, "[a]s many as forty states have privatized aspects of their welfare and public benefits administration and delivery programs and have spent billions on contracts with private welfare providers." Richard Frankel, *The Failure Of Analogy In Conceptualizing Private Entity Liability Under Section 1983*, 78 U.M.K.C. L. Rev. 967, 968 n.9 (2010) (citations omitted). Plus, "[w]ith billions of dollars in federal aid from the recently enacted economic stimulus package going to state and local governments, privatization opportunities should only increase." Frankel, *Regulating Privatized Government* at 1452.

Once the Ninth Circuit majority's decision is viewed against the backdrop of increasing privatization, two conclusions emerge. First, the decision would unleash countless *Bivens*-related actions on our courts. The majority has blurred the *Bivens* line in a way that creates uncertainty not just for private prison employees, but for all employees at any of the numerous private companies that contract with the government. All of these employees now face an inchoate risk that the decision may spur actions against them *personally*. At the same time, the federal judiciary has been inundated with approximately

19,000 *Bivens*-related actions in the last decade alone.[2] On its face, this number is astonishing considering that the Court has recognized *Bivens* actions in only three limited circumstances. However, because the Ninth Circuit majority's decision would potentially expose employees of all private government contractors to *Bivens* damages – when privatization of government functions is trending rapidly upwards – the number of actions seeking *Bivens* damages in the next decade could skyrocket. This consequence seems ill-advised for any time, but particularly so during this era of swollen budget deficits, dwindling public and private resources, and crowded court dockets.

In contrast, Congress can legislate appropriately tailored remedies for constitutional violations by employees of federal contractors, after giving careful consideration to the relevant data and policies through its fact-finding process. By taking this surgical approach, if it so chooses, Congress could more effectively balance (1) "the risk of raising a tide of

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[2] A recent study of five federal judicial districts found that *Bivens* claims comprised 1.2% of total federal question filings in 2009. *See* Alexander A. Reinert, *Measuring the Success Of Bivens Litigation And Its Consequences For The Individual Liability Model*, 62 Stan. L. Rev. 809, 835 (2010). For the year ending September 2009, there were 136,041 federal question filings nationwide. *See* Admin. Office of the U.S. Courts, *Judicial Business Of The United States Courts* 152 (2009) (Table C-2). From 1999 to 2009, there were 1,578,305 federal question filings. *Id.* (series 1999-2009, Table C-2). Thus, extrapolating the study's findings nationwide, our courts faced 1,632 *Bivens* filings in 2009 and 18,940 for the decade.

suits" that otherwise would engulf our courts, (2) the chilling effect such lawsuits would have on legitimate work-related initiative taken by federal contractor employees on behalf of the government and taxpayers, and (3) the relevant social and economic costs. *See Wilkie*, 551 U.S. at 562. Conversely, the Ninth Circuit majority's blunt-force approval of *Bivens* damages does little to strike this balance or further these salutary goals.

Second, increased privatization reinforces the importance of separation of powers principles here. If allowed to stand, the Ninth Circuit majority's decision will mean that private government contractors – across the board – will face increased costs associated with defending, indemnifying, and/or insuring their employees against potential *Bivens* damages. That, in turn, means increased privatization costs for the federal government and, ultimately, the taxpayer.

Of course, reasonable minds may differ regarding the extent to which rising privatization costs are acceptable in light of the policies supporting the availability of *Bivens* damages against government contractor employees. Reasonable minds also may differ as to whether and how the federal government could or should increase, continue, reduce, or eliminate privatization as a result of these rising costs or for any other reason. But, as this Court consistently has held, this debate is for the legislature and not the courts. *Meyer,* 510 U.S. at 486 ("decisions involving federal fiscal policy are not ours to make"); *Lucas*, 462 U.S. at 388 (Congress was better suited to determine whether *Bivens* remedy should be permitted based on

"the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for violations of employees' First Amendment rights").

CONCLUSION

The Ninth Circuit majority's decision disregards fundamental separation of powers principles that have been the bedrock of this Court's *Bivens* jurisprudence for the last three decades. It holds dramatic consequences not only for the court system, but also for the cost of privatized services for which the government wishes to contract and fund. Whether those consequences are an acceptable price for remedying constitutional violations by private contractor employees is a decision best left for Congress and not the courts. The decision should be reversed for these reasons, too.

Dated: July 29, 2011.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

MARGARET MINNECI, *et al.*,
Petitioners,

v.

RICHARD LEE POLLARD *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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QUESTION PRESENTED

Whether a federal inmate is barred from bringing a damages action for a violation of his Eighth Amendment rights because the federal actors who committed the violation were employed by a private prison operating under contract with the federal government.

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INTEREST OF *AMICI CURIAE*

Amici curiae are scholars with expertise in federal courts and constitutional law who have an interest in the proper interpretation of questions regarding constitutional remedies. In *amici*'s view, the lower court correctly held on separation-of-powers grounds that an action under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) lies to vindicate Eighth Amendment violations committed by employees of private prisons when they act under color of federal law.

SUMMARY OF ARGUMENT

As fully described in the parties' briefs, Mr. Pollard seeks damages for violations of the Eighth Amendment committed by prison officials acting under color of federal law when they failed to provide him with constitutionally adequate medical care. This Court specifically held that a *Bivens* cause of action protects Eighth Amendment interests against violation by federally employed prison officials acting under color of federal law in *Carlson v. Green*, 446 U.S. 14 (1980). Moreover, this Court has consistently recognized the availability of *Bivens* remedies for Eighth Amendment violations caused by federal employees since *Carlson*. *See Hui v.*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amici*, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with this brief.

Castaneda, 130 S. Ct. 1845, 1851–52 (2010); *Farmer v. Brennan*, 511 U.S. 825, 830 (1994); *McCarthy v. Madigan*, 503 U.S. 140, 142 (1992). Congress, furthermore, ratified *Carlson* as the means of vindicating Eighth Amendment rights against violation by federal employees in 1988 in the Westfall Act. 28 U.S.C. § 2679(b)(2)(A).

The only factual deviation between this case and *Carlson* is the happenstance that the United States government incarcerated Mr. Pollard in a facility that is privately run pursuant to a contract with the federal government rather than a facility run directly by the federal government. While this presents a question of first impression, this Court has often assumed that a *Bivens* action would lie in circumstances such as those found here. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72 (2001); *id.* at 79 n.6 (Stevens, J., dissenting); *cf. Schweiker v. Chilicky*, 487 U. S. 412, 418 n.1 (1988) (assuming that *Bivens* liability would exist against state official acting under color of federal law).

Nevertheless, Petitioners and the United States contend, in essence, that Mr. Pollard's constitutional-based *Bivens* remedies were contracted away by the Bureau of Prisons without his consent when the Bureau unilaterally made the decision to house him in a privately run prison. They argue that permitting liability here would require an "extension" of *Bivens* to a "new" category of defendants, and stress that the availability of state law remedies against contractors obviates the need for *Bivens* liability.

These arguments misunderstand the Court's *Bivens* jurisprudence. The availability of *Bivens*

relief does not turn on a rote inquiry into whether a "new" class of defendants is involved or whether there are any other potential remedies against the defendants. Instead, the relevant questions are ones of separation of powers: whether, for example, an alternative remedy provides reason to "infer that Congress expected the Judiciary to stay its *Bivens* hand," *Wilkie v. Robbins*, 551 U.S. 537, 554 (2007), and whether there are other "special factors" that speak to "who should decide whether such a remedy should be provided." *Bush v. Lucas,* 462 U.S. 367, 380 (1983). Thus, the question here is whether there is good reason to think that Congress intended the "Judiciary to stay its *Bivens* hand" for those injured by employees of federal contractors, despite having expressly authorized such suits against employees of the federal government.

The answer to that question is no. *First*, and most important, the Court's jurisprudence is clear that the potential availability of state law remedies does not weigh against the availability of a *Bivens* remedy for constitutional injuries unless *Congress intended* state law remedies to act as a substitute. *See Wilkie,* 551 U.S. at 554. To be sure, where *Congress* has authorized an alternative remedial scheme, separation-of-powers concerns may counsel in favor of not having the judiciary add its own remedy. *See, e.g., Bush,* 462 U.S. at 388–89. But state law remedies do not typically raise any questions of separation of powers, and this Court has never found that their presence warrants denying injured parties a *Bivens* remedy.

To the contrary, in cases like *Malesko*, this Court has consistently assumed that a *Bivens* action would

lie against private parties acting under the color of federal law even though those parties would presumably also be subject to state tort law. *See* 534 U.S. at 72. And in *Carlson*, this Court expressly found that the availability of a remedy under the Federal Tort Claims Act ("FTCA") did not preclude *Bivens* liability precisely because the relief it provided incorporated state law, which the Court found to be insufficiently "uniform" to indicate an intent to displace *Bivens*. *See* 446 U.S. at 19–20. Congress then proved the Court correct by preserving *Bivens* remedies, including *Carlson*'s remedy for violations of the Eighth Amendment, seven years later in the Westfall Amendment. 28 U.S.C. § 2679(b)(2)(A). Against this background, it would be passing strange now to hold that Congress intends state law remedies to be a substitute for *Bivens* actions against employees of contractors.

Second, the other separation-of-powers considerations that this Court has traditionally looked to all counsel in favor of a *Bivens* remedy here. In the past, for example, this Court has examined whether the availability of a *Bivens* remedy would impede congressional prerogatives by depleting the federal fisc. *See, e.g.*, *F.D.I.C. v. Meyer*, 510 U.S. 471, 484 (1994); *see also Malesko*, 534 U.S. at 69–71. There are no such concerns in providing a *Bivens* remedy in this context, and certainly no more of a concern than in *Carlson*.

Likewise, the Court has considered whether the contemplated *Bivens* action would impinge upon an area that is especially within a zone of congressional competence. *See, e.g., United States v. Stanley*, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296

(1983). And again, such concerns are no more relevant here than they were in *Carlson*. The regulation of Eighth Amendment violations in prisons is not an area of unique congressional competence, and this Court should ensure, as it did in *Carlson*, that a uniform remedy for constitutional violations is available regardless whether a defendant is directly or indirectly employed by the federal government. *See Malesko*, 534 U.S. 70–71; *Farmer*, 511 U.S. at 830; *Carlson*, 446 U.S. at 18–21.

Third, and finally, because the *Bivens* analysis is one of separation of powers — not defendant identity — the assumption that Petitioners, due to their private employment statuses, will not be able to invoke a qualified immunity defense is an irrelevant consideration. *See Hui*, 130 S. Ct. at 1851–52; *Stanley*, 483 U.S. at 684; *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 942 n.23 (1982). And in all events, the good-faith defense that is uniformly recognized by the circuit courts will ensure that defendants employed by private contractors are protected from liability in most circumstances in which qualified immunity would provide a defense for federal employees. For all of these reasons, this Court should affirm the court of appeals' ruling.

ARGUMENT

I. No "Extension" Of *Bivens* Is Required In This Case Because It Turns On The Same Separation-of-Powers Analysis *Carlson* Endorsed.

In *Carlson*, this Court held that federal employees acting under color of federal law may be held liable under a *Bivens* theory of recovery for

violations of the Eighth Amendment. 446 U.S. 14. Since then, this Court has consistently approved the availability of *Bivens* remedies for Eighth Amendment violations caused by federal employees acting under color of federal law. *See Hui*, 130 S. Ct. 1851–52 (recognizing that an Eighth Amendment *Bivens* claim is generally available but that it may be subject to certain immunities in particular cases); *Farmer*, 511 U.S. at 830 (accepting in a *Bivens* suit the existence of a cause of action pursuant to *Carlson* for Eighth Amendment violations); *Madigan*, 503 U.S. at 142 (similar).

Furthermore, Congress ratified *Carlson* as the means of vindicating Eighth Amendment rights against violation by federal employees acting under color of federal law in 1988 in the Westfall Act. *See* 28 U.S.C. § 2679(b)(2)(A) (retaining liability under *Bivens* against federally employed persons who commit "a violation of the Constitution of the United States"); *see also* James E. Pfander & David Baltmanis, *Rethinking* Bivens: *Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 122–23 (2009). As such, the availability of a *Bivens* remedy for Eighth Amendment violations committed by federal employees acting under color of federal law is a deeply rooted element of federal jurisprudence.

Petitioners and the United States seek to avoid the clear implications of this Court's rulings and congressional pronouncements by positing that in the instant case, it requires an "extension" of *Bivens* to apply *Carlson* to employees of federal contractors who violate the Eighth Amendment while acting under color of federal law. The nub of their

argument is that the Petitioners' identities as employees of a federal contractor requires a new extension analysis here. *See* Br. of Pet'rs at 36; Br. of United States at 14. But this Court's *Bivens* extension analysis is grounded upon separation-of-powers concerns — not upon the mere identity of the defendant *per se*. Because applying *Carlson*'s holding to Petitioners does not implicate a new separation-of-powers analysis, no "extension" of *Carlson* is necessary to provide a remedy to Respondents.

As we explain below, this Court has typically looked to three separation-of-powers considerations: (1) Has Congress approved an alternative remedial scheme to *Bivens* relief, (2) Will the *Bivens* action present a claim upon the federal fisc, and (3) Will the *Bivens* action impinge upon an area of unique congressional competence. All three of these factors cut in favor of preserving a *Bivens* remedy in this case.

A. The Potential Availability of State Law Remedies Does Not Eliminate The Need For *Bivens* Under This Court's Precedents.

The primary argument of Petitioners and the United States is that a *Bivens* remedy is inappropriate here because Petitioners may be subject to state tort law liability for the alleged constitutional injuries at issue. Petitioners and the United States seize upon language from this Court's cases which they claim shows that *Bivens* is available only to plaintiffs who "lack any alternative remedy." Br. of Pet'rs at 12 (citing *Malesko*); *see also* Br. of United States at 11 ("unnecessary and

unwarranted" to provide *Bivens* remedy where "alternative remedy exists").

This mechanical invocation of alternative remedies is misplaced. To be sure, this Court has looked to the existence of alternative remedies in conducting its *Bivens* analysis. But the critical point is that it has done so through a separation-of-powers lens, declining to permit a *Bivens* action where *Congress* already has contemplated an alternative remedial scheme. Thus, the inquiry is not simply whether there are alternative remedies, but whether it can be "infer[red]" from the availability of alternate remedies "that Congress expected the Judiciary to stay its *Bivens* hand." *Wilkie*, 551 U.S. at 554.

No such inference can reasonably be drawn here. Unlike some other *Bivens* cases that have come before the Court, this is not one in which Congress has adopted a comprehensive remedial scheme that suggests an intent to displace judicial remedies. This is not a case like *Bush*, for example, where the Court declined to allow a *Bivens* action because of "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." 462 U.S. at 388; *see also Schweiker*, 487 U.S. at 424 (declining to extend a *Bivens* remedy for violations of constitutional rights within the Social Security system because Congress already put in place "an unusually protective" remedial scheme (quotation marks omitted)); *Chappell*, 462 U.S. at 302, 304 (finding that Congress's comprehensive internal system of justice that "provides for the review and remedy of complaints and grievances such as those

presented" excluded "a damage remedy for claims by military personnel that constitutional rights have been violated by superior officers," leading the Court to conclude "a judicial response by way of [a *Bivens*] remedy would be plainly inconsistent with Congress' authority in this field").

Instead, this case falls within the logic of *Carlson*, where the Court found that even though Congress had provided a federal remedy to federal prisoners through the FTCA, that remedy did not preclude a *Bivens* action because "the congressional comments accompanying [the previous FTCA] amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." 446 U.S. at 19–20. In analysis that is equally pertinent here, the Court went further and found that Congress likely did not intend to preclude *Bivens* remedies *because liability under the FTCA was governed by state law*. The Court held that remedies for federal constitutional violations should not be "left to the vagaries of the laws of the several States . . . in the absence of a contrary congressional resolution." *Id.* at 23. In other words, this Court held that Congress would *not* want state law, as incorporated by the FTCA, to displace *Bivens* liability in this very context because it would not provide an adequate safeguard against constitutional injuries. It surely follows that if Congress did not intend a FTCA remedy based on state law to displace *Bivens*, it also did not intend state law remedies themselves to displace *Bivens*.

Indeed, today the Court has the benefit of the Westfall Amendment, which proves that the Court correctly gauged Congress's intent in preserving

Bivens remedies despite the presence of the FTCA. *See* 28 U.S.C. § 2679(b)(2)(A) (retaining liability under *Bivens* against federally employed persons who commit "a violation of the Constitution of the United States"); *see also* Pfander & Baltmanis, 98 GEO. L.J. at 122 (noting that Congress preserved the *Bivens* action in § 2679(b)(2)(A) and arguing that "the Westfall Act supports . . . the routine availability of *Bivens* claims"). Given Congress's express statement that *Bivens* claims should co-exist with FTCA claims for federal employees, it would be incoherent to hold that Congress nevertheless did not intend for *Bivens* to co-exist with state law remedies for federal contractors.

It is likely for this reason that this Court has consistently assumed that contractor employees would be subject to *Bivens* liability to the same extent that their federal counterparts are. For example, in *Malesko*, the Court's decision not to allow a *Bivens* remedy against a private prison corporation turned in part on its assumption – joined in by the United States – that injured parties *would* have a *Bivens* remedy against individual prison guard contractors. *Malesko*, 534 U.S. at 71–72. The Court reasoned that just as a *Bivens* remedy against a federal agency was unnecessary because *Bivens* was available against the agency officer, so too was it appropriate not to allow *Bivens* against a contracting corporation because *Bivens would* be allowed against "the individual directly responsible for the alleged injury." *Id.* at 71; *see also id.* at 79 n.6 (Stevens, J., dissenting) (similar). Likewise, in *Schweiker*, 487 U.S. at 418 n.1, the Court assumed without deciding that if an action were available under *Bivens* against

federal employees, it also would be available against other individual defendants acting under color of federal law. This reasoning is consistent with the rule the Court applies in § 1983 actions, where contractors acting under the color of state law are liable under § 1983 to the same extent as their state employee counterparts. *West v. Atkins*, 487 U.S. 42, 56–58 & n.14, 15 (1988).

In response, Petitioners and the United States point to the discussion of state law remedies in two cases of this Court – *Malesko* and *Wilkie* – but neither demonstrates that Congress would have thought that state law remedies are adequate to remedy constitutional injuries here. The invocation of *Malesko* is suspect in the first place because, as just explained, in that case the Court assumed that *Bivens* would be available against the employees of contractors acting under the color of federal law. And indeed *Malesko* does not support Petitioners' position. While *Malesko* noted the availability of state law remedies in declining to allow a *Bivens* remedy against a private corporation, the Court's primary concern was maintaining a symmetry of no *Bivens* liability for the federal agency (the Bureau of Prisons) and its private prison counterpart. 534 U.S. at 71–72. The availability of an alternative state law remedy was a basis not to override that concern, not an independent basis to deny *Bivens* liability. In contrast, here Petitioners are attempting to use a state law remedy as *the* basis for precluding *Bivens* liability, which would create (rather than prevent) an asymmetry of *Bivens* liability between federal prison officials and their private prison counterparts.

Similarly, in *Wilkie*, the Court refused to allow a *Bivens* claim not because of the availability of alternative state law remedies, but rather because *Wilkie* involved a new cause of action that the Court perceived to be "endlessly knotty to work out" and that "would invite an onslaught of *Bivens* actions," 551 U.S. at 562; *see also id.* at 554 (explaining that *Wilkie* is "a case for *Bivens* step two" (special factors analysis), not step one (alternative remedies analysis)). The *Wilkie* Court concluded that Congress was best situated to determine whether there should be a "damages remedy for actions by Government employees who push too hard for the Government's benefit." *Id.* at 562. That is to say, the alternative state law remedies discussion in *Wilkie* was not a blanket rule that the presence of state law relief bars a *Bivens* suit in every case. Rather, the *Wilkie* analysis was part of this Court's traditional separation-of-powers inquiry into congressional intent to deploy a remedial scheme as an alternative to a constitutional action. *See id.* at 554 (looking to alternative state law remedies to determine whether "*Congress expected* the Judiciary to stay its *Bivens* hand" (emphasis added)).

If anything, *Wilkie*'s focus on whether a *Bivens* remedy would be "endlessly knotty to work out" counsels in favor of the remedy here. It is Petitioners who argue for a case-by-case approach in which courts must assess whether a particular state law regime provides an adequate alternative remedy to *Bivens*.[2] Given that all parties agree that some

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[2] Rulings from the lower courts illustrate just how "knotty" the search for alternative state law remedies can be. *See, e.g., Peoples v. CCA Detention Ctrs.*, 422 F.3d 1090, 1103–04, 1107–

adequate remedy must be offered to Plaintiffs, it would be far less "knotty" to adopt a bright-line rule that simply permits a *Bivens* action in the context of Eighth Amendment claims by federal prisoners against prison personnel.[3]

***

In sum, there is no way to understand the potential availability of state law remedies in this case as providing an indication that Congress intended the courts to stay their *Bivens* hand. That conclusion is clear enough from the absence of an alternative federal remedy, and it is inescapable after *Carlson* and the Westfall Amendment, which conclusively demonstrate that Congress believes that a uniform federal remedy is required for constitutional claims.

B. The "Special Factor" Analysis Here Is Identical To *Carlson*'s.

The second part of this Court's analysis regarding whether to treat a class of defendants differently

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08 (10th Cir. 2005) (canvassing, among other things, a Kansas Attorney General Opinion in a *Bivens* case brought against employees of a privately run prison to find that alternative remedies likely lie under state law), *rev'd on other grounds by an evenly divided en banc court*, 449 F.3d 1097 (10th Cir. 2006) (en banc).

[3] Moreover, in contrast to the concern in *Wilkie*, recognizing that employees of federal contractors may be held liable for violations of the Eighth Amendment will not require this Court or lower courts to develop and manage new constitutional standards. The "deliberate indifference" standard of the Eighth Amendment has been operative since 1976, *see Estelle v. Gamble*, 429 U.S. 97 (1976), and applying it to employees of federal contractors will not require the development of any new law.

from other defendants for purposes of *Bivens* is the existence of any "special factors counseling hesitation" against permitting liability for the class. *See Wilkie*, 551 U.S. at 550. The case law demonstrates that these "special factors" generally focus on separation-of-powers considerations that cause the Court to exercise its discretion against permitting a cause of action even where no other alternative exists to remedy the constitutional violation. In this capacity, the Court must pay heed to its institutional limitations and exercise judgment not to act when crafting a remedy is best left to another branch of government. Here, there are no "special factors" which would support treating federal contractors acting under color of federal law differently than their federally employed counterparts who perform the same job.

First, Respondents' suit against Petitioners does not make a claim upon the federal fisc. In *Carlson*, one reason for allowing the *Bivens* suit to proceed was that the plaintiff could not directly impose liability upon the federal treasury. 446 U.S. at 20–21. Following this line of reasoning, this Court has declined to find a *Bivens* claim in cases where a federal entity may be held liable, *Meyer*, 510 U.S. at 486, or where a federal contractor who passes costs onto the federal government may be held liable, *Malesko*, 534 U.S. at 69–71. The Court explained that allowing such liability could create "a potentially enormous financial burden for the Federal Government," thereby implicating "federal fiscal policy," a matter best left to Congress, not the courts. *Meyer*, 510 U.S. at 486 (*citing United States v. Standard Oil Co.*, 332 U.S. 301, 311 (1947)). Here,

however, only individual liability is contemplated. The change in defendant identity from publicly employed prison officials acting under color of federal law, as was the case in *Carlson*, to government-contractor employed prison officials acting under color of federal law does not alter this fiscal analysis. The fiscal, separation-of-powers concerns raised in this case are identical to those raised in *Carlson* and should be controlled, therefore, by that decision. 446 U.S. at 21.

Second, deterring Eighth Amendment violations in prison is not an area of unique congressional competence for regulation. This Court has previously declined, on separation-of-powers grounds, to extend *Bivens* into certain realms the Court believes are uniquely subject to regulation solely by Congress. For example, in *Chappell*, the Court concluded that a *Bivens* action would be inappropriate in light of the Constitution's commitment to Congress of the authority to regulate military affairs. 462 U.S. at 300–01, 304; *see also Stanley*, 483 U.S. at 681–82 (same). These concerns date back to *United States v. Gilman*, 347 U.S. 507 (1954), which *Bivens* cited as instructive in marking the boundaries of the remedy, 403 U.S. at 396. In *Gilman*, the Court refused to infer an action because "a complex of relations between federal agencies and their staffs . . . [was] involved" and Congress had not taken a position on the policy question before the Court. 483 U.S. at 509–12. The decision, this Court held, was "more appropriately for those who write the laws, rather than for those who interpret them." *Id.* at 513.

In contrast, this Court has never indicated that Eighth Amendment-based *Bivens* claims such as Respondents' raise any concerns of impinging an area of unique congressional competence. Indeed, the claims here are no different than those in *Carlson*, where the Court held that a *Bivens* remedy should be available to plaintiffs injured by Eighth Amendment violations committed by federal agents. 446 U.S. at 18–19. The *Carlson* Court found that there were no special factors counseling hesitation because the defendants – prison medical personnel and others – "do not enjoy such independent status in our constitutional scheme as to suggest that *judicially* created remedies against them might be inappropriate." *Id.* at 19 (emphasis added). Since *Carlson*, the Court has permitted other Eighth Amendment-based *Bivens* claims against other types of defendants in different factual contexts without ever indicating any concern of impinging on an area of unique congressional competence. *See, e.g.*, *Farmer*, 511 U.S. at 830–31. In short, the special factors analysis in *Carlson* is identical to this case and therefore should bind the Court here under principles of *stare decisis*.

II. Petitioners' Lack Of A Qualified Immunity *Defense* Is Irrelevant To Whether There Is A *Remedy* Under *Bivens*, And Immaterial In Practice Because Of The Availability Of The Widely Recognized Good-Faith Defense.

Consistent with the foregoing observations regarding the central salience of separation-of-powers concerns in the *Bivens*-extension analysis, the Petitioners and United States' arguments that Petitioners' status as employees of government

contractors potentially renders the qualified-immunity defense unavailable in the instant case is irrelevant. Petitioners and the United States argue that the presumed unavailability of a qualified-immunity defense for private individuals acting under color of federal law constitutes a "special factor" counseling hesitation in applying *Carlson* to this case. *See* Br. of Pet'rs at 37; Br. of United States at 30. This perspective is inconsistent with this Court's jurisprudence.

This Court has repeatedly emphasized that the availability of a *Bivens* remedy "for particular *injuries* . . . is a question logically distinct from immunity to such an action on the part of particular *defendants*." *Stanley*, 483 U.S. at 684 (emphasis in original); *see also Hui*, 130 S. Ct. at 1851–52 ("Many of our . . . *Bivens* decisions . . . address[] only the existence of an implied cause of action for an alleged constitutional violation. . . . This case presents the separate question of whether petitioners are immune from suit for the alleged violations."); *Lugar*, 457 U.S. at 942 n.23 ("In our view, however, [the unfairness of imposing liability on innocent followers of state law] should be dealt with not by changing the character of the cause of action [e.g., § 1983] but by establishing an affirmative defense."). Just as in determining liability under a statute where the court does not "consult[] the scope of common-law immunity enjoyed by actors in the area to which the statute pertains," in the *Bivens* inquiry, whether a damages action can be brought under the Constitution is "analytically distinct" from whether the defendant would have official immunity. *Stanley*, 483 U.S. at 684. This is because, as the

Court noted in *Bush*, the "special factors" inquiry has nothing to do with the "merits of the particular remedy that was sought," but with the separation-of-powers question of determining "who should decide [the Court or Congress] whether such a remedy should be provided." 462 U.S. at 380. Because the principal concern in recognizing *Bivens* claims is the balance of power between the courts and Congress, whether a particular defendant will be held liable in a particular case is irrelevant to this structural question.

To the extent that this Court's past opinions suggest that a non-separation-of-powers concern such as the availability of an affirmative defense is a factor in the *Bivens*-extension question, *see Carlson*, 446 U.S. at 19, such an analysis would not be limited solely to the existence of qualified immunity. *See Davis v. Passman*, 442 U.S. 228, 246 (1979) (implying a *Bivens* action against a congressman in part because the Speech and Debate clause provided defendants with a zone of protection from excessive liability). Indeed, even if the Petitioners do not have qualified immunity available as a defense, they almost certainly will be able to maintain a good-faith defense at trial, the contours of which overlap significantly with qualified immunity. *See Richardson v. McKnight*, 521 U.S. 399, 413–14 (1997) (stating that private defendants likely may assert a "good faith" defense to a § 1983 claim); *Wyatt v. Cole*, 504 U.S. 158, 169 (1992) (same); *see also* Sheldon Nahmod, *The Emerging Section 1983 Private Party Defense*, 26 CARDOZO L. REV. 81, 90–94 (2004) (describing the good-faith defense as similar to qualified immunity on the question of immunity to

liability).[4] Again Petitioners and the United States' defendant-identity-based arguments simply are out of step with this Court's decades-long, separation-of-powers approach to *Bivens* extension jurisprudence.

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[4] The lower courts have recognized the good-faith defense for non-governmental employees who commit constitutional violations while acting under color of law without fail post *Richardson*. *See Clement v. City of Glendale*, 518 F.3d 1090, 1097 (9th Cir. 2008) (allowing the good-faith defense in a non-prison context where company "did its best to follow the law and had no reason to suspect that there would be a constitutional challenge to its actions"); *Vector Research, Inc. v. Howard & Howard Attorneys, P.C.*, 76 F.3d 692, 699 (6th Cir. 1996) (similar); *Pinsky v. Duncan*, 79 F.3d 306, 311 (2d Cir. 1996) (similar); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 (3d Cir. 1994) (similar); *Wyatt v. Cole*, 994 F.2d 1113, 1120 (5th Cir. 1993) (on remand from Supreme Court); *Palmer v. Garuti*, No. 06-cv-795, 2009 WL 413129, at *6 (D. Conn. Feb. 17, 2009) (noting that since *Richardson*, "every Circuit Court to directly address this question [of good-faith immunity for private persons acting under color of law] has answered it in the affirmative"); *Hunsberger v. Wood*, 564 F. Supp. 2d 559, 572 (W.D. Va. 2008) (private parties entitled to good-faith defense unless they "act with malice or . . . knew or should have known their actions violated the Constitution"), *rev'd and remanded on other grounds*, 570 F.3d 546 (4th Cir. 2009); *Sundquist v. Philip*, No. C 06-3387, 2008 WL 859452, at *18 (N.D. Cal. Mar. 28, 2008) (holding that a privately run prisoner transportation corporation may pursue the good-faith defense against Fourth Amendment, Equal Protection and Due Process claims), *aff'd* 346 F. App'x 143 (9th Cir. 2009); *Grosjean v. Imperial Palace, Inc.*, 212 P.3d 1068, 1076–77 (Nev. 2009) (citing *Richardson* and holding that the good-faith defense was available to private security guards acting under color of state law).

CONCLUSION

The judgment of the court of appeals should be affirmed.

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AMICUS CURIAE BRIEF

RECORD
AND

No. 10-1104

IN THE

Supreme Court of the United States

MARGARET MINNECI, et al.,

Petitioners,

v.

RICHARD LEE POLLARD, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTEREST OF AMICUS CURIAE[1]

This case presents the question whether employees of a private company operating a correctional facility under contract with the Bureau of Prisons (BOP) are subject to implied damages actions under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

In addition to the BOP, other federal agencies also house detainees in privately-run facilities. In the context of this case, it is of particular concern to the United Mexican States (Mexico) that roughly half of the detainees held by U.S. Immigration and Customs Enforcement (ICE) are housed in privately-operated facilities. On any given day, more than 10,000 Mexican nationals are being held in civil detention by ICE.

Under Article 5(a) of the Vienna Convention on Consular Relations, to which both the United States of America and Mexico are parties, Mexico has the right to protect the interests and welfare of its nationals, within the limits of international law. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820. Mexico accordingly files this Amicus Curiae brief in the interest of ensuring that all of its nationals present in the U.S. and held in custody by any agency of the U.S. government in a privately-operated facility are accorded the full measure of human and civil rights

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1. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person, other than the amicus curiae or its counsel made any monetary contribution to the preparation or submission of this brief.

guaranteed to them under the U.S. Constitution, treaties and international law. In this case, that includes an interest in preserving *Bivens* remedies for those Mexican nationals detained in privately-operated jails, prisons and immigration detention facilities in the United States.

SUMMARY OF THE ARGUMENT

The United Mexican States (Mexico) submits this brief as Amicus Curiae in support of the Respondent, Richard Lee Pollard.

A. Richard Lee Pollard was, at the time this case arose, an inmate in a Bureau of Prisons (BOP) facility. But the significance of the question presented for review by this Court reaches beyond the particular facts involved in his case. Other federal agencies also house detainees in privately-operated facilities, including many Mexican nationals, many of whom are held in civil not criminal detention. Unless narrowly decided, a ruling in this case will likely carry consequences for thousands of other detainees whose detention arises from circumstances materially different than Mr. Pollard's. In particular, Mexico is concerned that a focus on Mr. Pollard's specific claims should not cause the Court to overlook the possible consequences of a decision in this case for Mexican nationals being detained in facilities that are privately operated, including in civil immigration detention facilities.

Mr. Pollard might have alternative remedies under state law for his particular Eighth Amendment claims. But many detained Mexican nationals bringing claims for alleged constitutional violations have no cause of action

except one under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), because of: (a) the gaps between federal constitutional law and state common law and statutory law; (b) the increasing hostility of state law in a number of jurisdictions to noncitizens' rights, which further limits their state remedies; (c) ICE's refusal to provide administrative remedies, in the case of immigration detainees; and (d) the unavailability of entity liability under *Bivens* after *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) (holding that there is no private right of action pursuant to *Bivens* against private entities, while reserving the question of whether an action would lie against the individual employees of a private entity). Without a cause of action against employees of private prison companies under *Bivens*, Mexican nationals, both in civil immigration detention and in other forms of privatized custody in the U.S., will in many instances be left without any meaningful cause of action for many of the most frequent violations of their rights.

B. The decision of the Court of Appeals in this case correctly recognized a *Bivens* cause of action against the employees of a private prison company. In the context of privatization, a *Bivens* cause of action serves a very vital function. It prevents federal agencies from evading constitutional scrutiny and liability for the exercise of the most palpable forms of state police power when, instead of exercising those powers themselves, they delegate them to private concessionaires. In the absence of a *Bivens* cause of action to constrain their conduct, employees of private concessionaires exercising police powers will be insufficiently deterred from conduct that violates constitutional norms. State law causes of action simply are

not an adequate substitute for a *Bivens* remedy, either in general or for Mexican nationals and other immigrants in particular. The protections afforded by the Constitution and by state law are not coextensive.

ARGUMENT

I. A *BIVENS* CAUSE OF ACTION SERVES THE VITAL FUNCTION OF PREVENTING FEDERAL AGENCIES FROM CIRCUMVENTING CONSTITUTIONAL CONSTRAINTS ON THE EXERCISE OF THEIR POWERS WHEN THEY DELEGATE THOSE POWERS TO PRIVATE CONTRACTORS.

A. The fastest growing form of federal incarceration is the detention of immigrants in privately-operated facilities. ICE detained 363,064 immigrants during 2010 and housed approximately half of them in scores of facilities across the country that are operated not by ICE itself but rather by private prison companies.[2] By contrast,

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2. Detention Watch Network, *The Influence of the Private Prison Industry in Immigration Detention*, http://www.detentionwatchnetwork.org/privateprisons (noting that 49% of ICE detainees were held in privately-operated detention facilities in 2009); Donald Kerwin & Serena Yin-Ying Lin, *Immigration Detention: Can ICE Meet its Legal Imperatives and Case Management Responsibilities*? (Migration Policy Inst., 2009) 14-15 (noting that twelve of ICE's seventeen most populated immigration detention facilities were managed by for-profit correctional companies in 2009), http://www.migrationpolicy.org/pubs/detentionreportSept1009; *Moving Toward More Effective Immigration Detention Management: Hearing Before the Subcomm. on Border, Maritime, and Global Counter-terrorism of the H. Comm. on Homeland Security*, 111th Cong. 10-11 & Table 1

in the criminal justice system, eight percent of prison beds are managed by private companies.[3]

B. Mexican nationals account for roughly 61 percent of the total immigrant population detained by ICE.[4] Their detention is a state-imposed form of physical restraint, "the most palpable form of state police power." *Richardson v. McKnight*, 521 U.S. 399, 414 (1997) (Scalia, J., dissenting). It encompasses both the use of force and the placement of detainees in isolation. It should be subject to constitutional constraints, both when administered directly by the BOP or ICE and when administered by private concessionaires.

C. Delegation to private concessionaires should not become a means for any federal agency to remove the exercise of its police powers from constitutional scrutiny and liability, whether in BOP facilities, ICE facilities or elsewhere. *See generally, Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995) ("It surely cannot

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(2009) (statement of Donald Kerwin, Vice President for Programs, Migration Policy Inst.) (noting that "private corporations manage all but one of ICE's own Service Processing Centers (SPCs) and its largest contract facilities"), http://www.homelandsecurity.house.gov/SiteDocuments/20091210105631-76330.pdf.

3. Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2009*, Appendix table 20 (Dec. 2010), http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2232.

4. Office of Immigration Statistics, U.S. Dep't of Homeland Sec., Annual Report (June 2011), *Immigration Enforcement Actions* 4 (providing data for total detentions and percentage of Mexican nationals), http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf.

be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form"); *West v. Atkins*, 487 U.S. 42, 56 & n.14 (1988) ("Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights."); Gillian E. Metzger, *Privatization as Delegation*, 103 Colum. L. Rev. 1367, 1401 (2003) ("Adequately guarding against abuse of public power requires application of constitutional protections to every exercise of state authority, regardless of the formal public or private status of the actor involved.")[5]

Because state police powers are increasingly privatized, and because without a *Bivens* cause of action those powers are prone to being exercised without constitutional scrutiny and liability, *Bivens* remedies are an increasingly necessary safeguard in protection of liberty and due process. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Fifth Amendment's Due Process] Clause protects");

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5. Regarding incentives to outsource sovereign functions and the risks of doing so, see generally, Paul R. Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do About It* (Cambridge Univ. Press 2007). *See also*, Jon D. Michaels, *Deputizing Homeland Security*, 88 Tex. L. Rev. 1435, 1447-66 (2010) (discussing "the Executive Branch's ability to deploy private-sector resources in efforts to overcome restrictions placed by Congress and the courts on its (public) power").

Robertson v. United States ex rel. Watson, 130 S. Ct. 2184, 2190 (2010) (Roberts, J., dissenting) ("A basic step in organizing a civilized society is to take th[e] sword [of enforcement] out of private hands and turn it over to the organized government, acting on behalf of all the people.") A *Bivens* cause of action is a particularly vital safeguard in protection of liberty and due process in cases where, as for many Mexican nationals, meaningful alternative remedies are often unavailable.[6]

D. Migration between Mexico and the United States has occurred for generations. In the relations between the United States and Mexico, as in the relations between many countries throughout the world, migration is a fact of life. Although sovereigns have the authority to detain unauthorized immigrants present within their borders, that detention is subject to limits, including

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6. The tradition of judicially-implied causes of action, created without express legislative authorization, has a long pedigree that pre-dates *Bivens* by hundreds of years. *See, e.g., Couch v. Steel*, (1854) 118 Eng. Rep. 1193, 1196-98 (K.B.); *Rowning v. Goodchild*, (1773) 96 Eng. Rep. 536 (K.B.); *Anonymous*, (1703) 87 Eng. Rep. 791 (Q.B.); *Ashby v. White*, (1702) 92 Eng. Rep. 126, 136-39 (K.B.). *See also*, Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 Geo. L.J. 1493, 1496 (1989) ("The historical record...reveals a tradition of federal question damage actions [for constitutional injuries], long antedating modern implied rights of action...[and against] both federal and state officers"); Al Katz, *The Jurisprudence Of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. Pa. L. Rev. 1, 43-44 (1968) ("[T]here is nothing in history to show that damages—the ordinary remedy at law—were not as readily applied to protect interests in liberty as to protect other interests....The remedy at law, in fact, appears to be the only one the propriety of which was never seriously questioned.")

under international law. Mexican nationals detained in the U.S., like immigrants detained in other countries, have certain inalienable rights that may not be violated either by sovereigns themselves or by their contractors. *See* International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res, 45/158, U.N. Doc. A/RES/45/158 (Dec. 18, 1990).[7] *See also* Universal Declaration of Human Rights, G.A. Res. 217A (III), Article 2, U.N. Doc. A/810 (Dec. 12, 1948) (declaration that all individuals are to be afforded the same rights and freedoms without regard to nationality); Ley de Migración [Immigration Law], Diario Oficial de la Federación, el 25 de mayo de 2011 (Mex.), http://dof.gob.mx/nota_detalle.php?codigo=5190774&fecha=25/05/2011. (An English translation of the Ley de Migración will be filed with the Clerk of the Court upon request).

E. Most immigration detainees in the United States have never been convicted of a crime.[8] Many, despite their detention, are entitled to reside and remain in the United States. Notably, in nearly one third of

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7. The United States is not a signatory to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

8. Michelle Roberts, *Immigrants Face Long Detention, Few Rights*, Associated Press, March 16, 2009 (according to data provided by ICE, 58 percent of immigrants held in detention on January 25, 2009 had no criminal convictions), http://www.deseretnews.com/article/705291116/Immigrants-face-long-detention-few-rights.html. The less than half of immigration detainees who have been convicted of a crime have already served their sentences. They are placed in ICE custody only after their criminal sentences. Their detention for immigration purposes is a form of civil administrative detention.

removal hearings, ICE's requests for removal are denied. Transactional Records Access Clearinghouse, *ICE Seeks to Deport the Wrong People* (Nov. 9, 2010), http://trac.syr.edu/immigration/reports/243/. Among the Mexican nationals in detention, many are the parents of U.S. citizen children under the age of 5.[9] Some are themselves United States citizens.[10] Many others are longtime residents of the United States who were brought to this country as children by their parents, have lived in the U.S. ever since,

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9. Between 1997 and 2007, the United States deported the foreign parents, many of them Mexican, of an estimated 88,000 U.S. citizen children. Approximately half of these children were under the age of 5 when their parent was deported. Jonathan Baum et al., *In the Child's Best Interest? The Consequences of Losing a Lawful Immigrant Parent to Deportation* 4 (March 2010), http://www.law.berkeley.edu/files/Human_Rights_report.pdf. *See also,* U.S. Dep't of Homeland Sec., Office of Inspector Gen., *Removals Involving Illegal Alien Parents of United States Citizen Children* (2009), http://www.dhs.gov/xoig/assets/mgmt rpts/OIG_09-15_Jan09.pdf; Emily Butera, *Torn Apart By Immigration Enforcement: Parental Rights And Immigration Detention* (Women's Refugee Comm'n, 2010), http://womensrefugeecommission.org/programs/detention/parental-rights; Dorsey & Whitney LLP, *Severing a Lifeline: The Neglect of Citizen Children in America's Immigration Enforcement Policy* (2009), http://www.dorsey.com/files/upload/DorseyProBono_SeveringLifeline_ReportOnly_web.pdf.

10. Tyche Hendricks, *U.S. citizens wrongly detained, deported by ICE*, S. F. Chron. July 27, 2009, at A1; Andrew Becker & Patrick J. McDonnell, *Citizens Snared in the Net*, L.A. Times, Apr. 9, 2009, at A1; Jacqueline Stevens, *Thin ICE*, The Nation, June 23, 2008. *See also,* Jacob Chin et al., *Attorneys' Perspectives on the Rights of Detained Immigrants in Minnesota* (Hubert H. Humphrey Inst. of Public Affairs, 2009), http://www.mcaa-mn.org/docs/2009/20091204121228744.pdf.

attended school in the U.S., and have started their own families here. For them, deportation means separating both from their families and from a country where they have lived virtually their entire lives. *Cf. Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (recognizing the "impact of deportation on families living lawfully in this country").

F. ICE and its contractors detain immigrants under civil law, either pending a decision on whether they will be removed (deported), 8 U.S.C. § 1229a, or awaiting removal after a removal order has issued. *See Zavydas v. Davis*, 533 U.S. 678, 682 (2001). Yet, despite the clear civil nature of immigration detention, the Department of Homeland Security (DHS) acknowledges that ICE and its contractors operate detention facilities as if they were penal institutions.[11] After reviewing ICE's detention practices for DHS, the former Director of ICE's Office of Detention Policy and Planning prepared a report and recommendations criticizing ICE for

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11. *See* Dora B. Schriro, U.S. Dep't of Homeland Sec., Immigration Detention Overview and Recommendations 16, 21 (2009), http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf; Mary Bosworth & Emma Kaufman, *Foreigners in a Carceral Age: Immigration and Imprisonment in the United States*, 22 Stan. L. & Pol'y Rev. 429, 440 (2011); Amnesty Int'l, Jailed without Justice: Immigration Detention in the USA 29-43 (March 25, 2009) (describing detention conditions), http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf; Michelle Brané & Christiana Lundholm, *Human Rights Behind Bars: Advancing the Rights of Immigration Detainees in the United States Through Human Rights Frameworks*, 22 Geo. Immigr. L.J. 147, 162 (2008) ("Detention center staff is ignorant about the distinction between administrative detention and punitive custody.")

"carrying criminal incarceration policies and practices into the arena of immigration detention."[12] She noted that importing standards of criminal detention into civil immigration detention facilities was both inconsistent with immigration detention's non-criminal purposes and inappropriate for the majority of ICE's immigration detention population.[13] She also emphasized that: "The demeanor of the Immigration Detention population is distinct from the Criminal Incarceration population. The majority of the [Immigration Detention] population is motivated by the desire for repatriation or relief, and exercise exceptional restraint....[F]ights are infrequent, and assaults on staff are even rarer." Schriro, U.S. Dep't of Homeland Sec., *Immigration Detention Overview and Recommendations* 16.

G. Both DHS itself and others have repeatedly documented widespread deficiencies in the policies and conditions in immigration detention facilities.[14] Many of

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12. Schriro, *supra*, at 21. Conditions permissible for criminal custody are not constitutionally permissible for civil detention, "lest 'civil commitment' become a 'mechanism for retribution'," which is a function properly "of criminal law, not civil commitment." *Kansas v. Crane*, 534 U.S. 407, 412 (2002). *See also*, Rule 8(c), Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF/611, Annex I A (1955); *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (distinguishing civil from criminal detention).

13. Schriro, *supra*, at 21.

14. See, among others, Schriro, *supra*, at 21; *Jailed without Justice*, *supra*; Karen Tumlin et al., *A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers* (Nat'l Immigration Law Center, 2009) ("NILC Report"), http://www.nilc.org/immlawpolicy/arrestdet/A-Broken-System-2009-07.pdf; Inter-American Comm'n on

these failings raise serious constitutional questions. It has also been noted that they give rise to hardships that induce appreciable numbers of detainees to acquiesce in removal simply to obtain release from custody, even when they have valid claims to remain in the United States.[15]

The following are among the serious reported violations of constitutional rights allegedly suffered by Mexican nationals and others in ICE facilities: restrictions

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Human Rights, *Immigration in the United States: Detention and Due Process* (2010) ("IACHR Report"), http://cidh.org/pdf files/ReportOnImmigrationInTheUnited States-Detention AndDueProcess.pdf; N.Y. Univ. Sch. Of Law Immigrant Rights Clinic, *Locked Up but not Forgotten: Opening Access to Family & Community in the Immigration Detention System* (2010), http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website__news__media/documents/documents/ecm_pro_065626.pdf; Seattle Univ. Sch. Of Law Int'l Human Rights Clinic & OneAmerica, *Voices from Detention: A Report on Human Rights Violations at the Northwest Detention Center in Tacoma Washington* (2008) (reporting on conditions at the privately-run Northwest Detention Center, owned and operated by The GEO Group, Inc.), http://law.seattleu.edu/x3333.xml; Dana Priest & Amy Goldstein, *Careless Detention*, Washington Post, May 11-14, 2008, http://www.washingtonpost.com/wp-srv/nation/specials/immigration/index.html.

15. *Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing before the Subcomm. on Immigration, Citizenship, Refugees, Border Security and Int'l Law of the House Comm. on the Judiciary*, 110th Congress, 2nd Sess., 56, 62 (2008) (statement of Kara Hartzler, Florence Immigrant and Refugee Rights Project); Amnesty International, Jailed Without Justice: Immigration Detention in the USA 13, 20 (March 25, 2009), http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf.

on access to counsel and to legal materials;[16] obstacles to detainees' rights to participate in hearings regarding the potential termination of their parental rights;[17] inadequate

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16. NILC Report, *supra*, at 26-43 (discussing restrictions on access); U.S. Gov't Accountability Office, GAO-07-875, Report to Congressional Requesters, Alien Detention Standards 5 (July 2007) (same), http://www.gao.gov/new.items/d07875.pdf; Michael J. Wishnie et al., Petition for Rulemaking to Promulgate Regulations Governing Detention Standards for Immigration Detainees 24-28 (2007) ("Rulemaking Petition") (same), http://nationalimmigrationproject.org/legalresources/Immigration Enforcement and Raids/Detention Standards Litigation/Detention Standards Petition for Rulemaking-2009.pdf. *See also, Bounds v. Smith*, 430 U.S. 817, 821-22 (1977) (detainee access to courts must be adequate, effective and meaningful); Inter-American Comm'n on Human Rights, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle V (2008) (affirming the right of all persons deprived of liberty to "to communicate privately with their counsel, without interference or censorship, [and] without delays or unjustified time limits"), http://www.cidh.oas.org/Basicos/English/Basic21.a.Principles and Best PracticesPDL.htm.

17. Elizabeth Hall, Note, *Where Are My Children...and My Rights? Parental Rights Termination as a Consequence of Deportation*, 60 Duke L.J. 1459 (2011); Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, Connecticut Law Review, Vol. 44, No. 1, 2011; Emily Butera, *Torn Apart By Immigration Enforcement: Parental Rights And Immigration Detention* (2010), http://womensrefugeecommission.org/programs/detention/parental-rights; Jonathan Baum, *et al.*, *In the Child's Best Interest?: The Consequences of Losing a Lawful Immigrant Parent to Deportation* 1 (March 2010), http://www.law.berkeley.edu/files/Human_Rights_report.pdf. *Compare Santosky v. Kramer*, 455 U.S. 745 (1982) (fundamental liberty interest of natural parents in the care custody, and management of their child); *Stanley v. Illinois*, 405 U.S. 645 (1972) (entitlement to a

medical care;[18] overcrowding;[19] and the absence of effective, or sometimes any, procedures for detainees to file grievances.[20]

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hearing); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 44, G.A. Res, 45/158, U.N. Doc. A/RES/45/158 (Dec. 18, 1990) ("State Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers.")

18. Fla. Immigrant Advocacy Ctr., *Dying for Decent Care* 7 (2009) ("[D]etainees are routinely subjected to poor, and sometimes appalling, medical care"), http://www.fiacfla.org/reports/DyingForDecentCare.pdf; Dana Priest & Amy Goldstein, *Careless Detention*, Washington Post, May 11-14, 2008 (four-part investigative series, concluding that there is a "massive crisis in detainee medical care") http://www.washingtonpost.com/wp-srv/nation/specials/immigration/index.html. *Compare Estelle v. Gamble*, 429 U.S. 97 (1976) (deliberate indifference to serious illness or injury constitutes cruel and unusual punishment).

19. American Civil Liberties Union, *Conditions of Confinement in Immigration Detention Facilities* 8-9 (2007), http://www.aclu.org/pdfs/prison/unsr_briefing_materials.pdf.

20. NILC Report, *supra*, at 62 (noting that "At least 12 facilities failed to include *any* of the required grievance procedure information in their detainee handbooks....All told, [ICE's own] reviews documented violations of th[e grievance standard] at 40 facilities"); IACHR Report, *supra*, at 119-20; Rulemaking Petition, *supra*, at 24-28. *Compare* Inter-American Comm'n on Human Rights, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle VII (""Persons deprived of liberty shall have the right of individual and collective petition and the right to a response before judicial, administrative, or other authorities."), http://www.cidh.oas.org/Basicos/English/Basic_Principles_and_Best_Practices_PDL.htm.

H. There are no regulatory standards binding on private immigration detention facilities or enforceable by immigration detainees. While the United States emphasizes that BOP contract facilities operate subject to compliance standards (U.S. Br. at 3-4), contract facilities housing immigration detainees do not operate under similar constraints. The Bureau of Prisons issued comprehensive, binding regulations for detention standards more than thirty years ago. 28 C.F.R. §§ 500.1-572.40. DHS, by contrast, has not done so.[21] As a result, Mexican nationals in immigration detention not only have no meaningful administrative remedies, they frequently have none at all. *Compare Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (emphasizing that BOP inmates like Mr. Pollard, by contrast, "have full access to remedial mechanisms established by the BOP" including "grievances filed through the BOP's Administrative Remedy Program").

I. The United States similarly emphasizes BOP's performance requirements, as well as its ongoing monitoring of its contract facilities. U.S. Br. 3-5. Again,

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21. DHS has full statutory authority to issue regulatory standards that would bind private immigration detention facilities. *See* 8 U.S.C. § 1103(a)(11) (conferring authority over detention conditions for immigrants detained by the federal government but held in non-federal institutions). But it has refused to issue regulations. DHS Denial of "Petition for Rulemaking to Promulgate Regulations Governing Detention Standards for Immigration Detainees" (July 24, 2009), http://nationalimmigrationproject.org/legalresources/ImmigrationEnforcementandRaids/DetentionStandardsLitigation/DHSdenial-07-09.pdf. *See also*, Nina Bernstein, *U.S. Rejects Changes in Detainee Rules*, N.Y. Times, July 29, 2009, at A17.

immigration detention facilities are not similarly monitored. Deficiencies in ICE's oversight over contract facilities have been well documented, both by ICE itself and by others.[22] The opaqueness under which ICE has permitted contract facilities to operate is also well documented.[23] For years; the agency refused to allow the public access either to its own facility audits or to the results of reviews conducted by the American Bar Association and the United Nations High Commissioner for Refugees.[24] The extent to which immigration

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22. NILC Report, *supra*, at vii (noting that "the government's past efforts to monitor compliance...have been woefully deficient"); Rulemaking Petition, *supra*, at 20-22. ICE has itself acknowledged that "The present immigration detention system [spread out over as many as 350 different facilities, most of which are not run by ICE] is sprawling and needs more direct federal oversight and management." U.S. Customs and Immigration Enforcement, *Fact Sheet: 2009 Immigration Detention Reforms*, http://www.ice.gov/news/library/factsheets/reform-2009reform.htm.

23. NILC Report, *supra*, at vi ("[T]he government has maintained a deliberate policy of opaqueness with respect to whether detention facilities conform to [performance] standards"); Nina Bernstein, *Officials Obscured Truth of Migrant Deaths in Jails*, N.Y. Times, Jan. 9, 2010, at A1 (referring to a "culture of secrecy," including "scathing [internal] investigative reports that were kept under wraps" and "officials working to stymie outside inquiry").

24. Both the ABA and the UNHCR were granted access to immigration detention facilities on the condition that reports of their observations would be shared only with ICE. NILC Report, *supra*, at vi. In 2008, Jorge Bustamante, the United Nations Special Rapporteur on the human rights of migrants, was denied access to the privately-run Hutto Detention Center in Texas—despite receiving approval from the U.S. State Department. Press Release, United Nations, Special Rapporteur

detention facilities operate free of substantive constraints and unobserved makes *Bivens* remedies all the more necessary.

J. Economic theory would suggest that in the absence of *Bivens* remedies private contractors operating immigration detention facilities will have few, if any, incentives to comply with the normative constraints of constitutional law. First, their competitive advantage often turns on their claim to be able to perform at a lower cost than a public agency, whereas in most cases constitutional accountability and price-cost margins point in opposite directions. Second, in the case of contracts for immigration detention facilities, the power to exit the contract rests with ICE, not detainees, and ICE's interests in constitutional compliance do not equal detainees' interests in constitutional compliance. On both these points, see generally, Edward Rubin, *The Possibilities and Limitations of Privatization*, 123 Harv. L. Rev. 890, 924-928 (2010).

Third, *Bivens* actions are likely to be more effective and more efficient than any increase in governmental monitoring, because monitoring adds a layer of expensive, cumbersome bureaucracy, and that is particularly the case when adequate metrics for evaluating performance are likely to be complex, as they are in the case of prison management. *See* Richard Frankel, *Regulating Privatized Government Through §1983*, 76 U. Chi. L. Rev. 1449, 1498-99 (2009).

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on Migrants Ends Visit to the United States (May 17, 2007), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=6139&LangID=E.

II. STATE LAW IS INSUFFICIENTLY PROTECTIVE OF CONSTITUTIONAL NORMS, INSUFFICIENTLY PROTECTIVE OF THE RIGHTS OF MEXICAN NATIONALS AND OTHER IMMIGRANTS, AND SHOULD BE IRRELEVANT TO THE EXISTENCE OF A *BIVENS* CAUSE OF ACTION.

A. The concepts of judicial review and of a constitution that is judicially enforceable against the executive branch are among the United States of America's greatest exports. They have influenced constitutional design and judicial power all over the world. *See* Anne-Marie Slaughter, *A Brave New Judicial World*, in *American Exceptionalism and Human Rights*, 275, 301 (Michael Ignatieff ed. 2005); *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (Louis Henkin & Albert J. Rosenthal, eds., 1990).[25] Among the ideals that this Court has thus propagated to the world are, first, that a constitution should be judicially enforceable as positive law and, second, that when a court has jurisdiction to decide a constitutional issue it also has the power to grant relief for constitutional violations. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824); *Ex parte Young*, 209 U.S. 123

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25. In 1881, Ignacio Vallarta, President of the Supreme Court of Mexico, wrote a decision declaring the power of judicial review, citing *Marbury v. Madison* and The Federalist No. 78. *Pleno de la Suprema Corte de Justicia de la Nación. Seminario Judicial de la Federación, Segunda Época, tomo* III, *septiembre* de 1881, 339. (An English translation of the decision will be filed with the Clerk of the Court upon request).

(1908).[26] The Court should not retreat from these ideals in this case.[27]

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26. Many seminal civil rights cases have been brought as direct actions to enforce the Constitution. See, among others, *Truax v. Raich*, 239 U.S. 33 (1915); (striking down an Arizona statute prohibiting the employment of noncitizens, on equal protection grounds) *Bell v. Hood*, 327 U.S. 678, 684 (1946) (noting there was an "established practice" of granting injunctive relief directly under the Constitution, and suggesting no reason why damages should be different); *Terry v. Adams*, 345 U.S. 461, 478 n.2, 484 (1953) (Clark, J. concurring) (addressing claims that "rested on" the Fourteenth and Fifteenth Amendments and holding that "pre-primary" elections conducted by private associations, from which African-Americans were excluded, were unconstitutional); *id.* at 467 (n.2) (noting that the Fifteenth Amendment is "self-executing"); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that racial segregation in the District of Columbia's public schools violated the Fifth Amendment). *See generally*, Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U.L. Rev. 681 (2009).

27. As Professor Meltzer has noted, a retreat from the tradition that the Constitution is enforceable by the judiciary, independent of Congressional directives, would have profound consequences, detrimentally making the Constitution merely a shield and not a sword: "[I]f Congress had never enacted § 1983 or other federal civil rights statutes, *Brown v. Board of Education* might well have been dismissed on a Rule 12(b)(6) motion; no federal remedy would have existed, and the plaintiffs' ability to obtain specific relief against school segregation would have depended on the happenstance of whether state law provided some private remedy through which plaintiffs could get such relief against school officials." Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 Geo. L. J. 2537, 2551 (1998).

B. Petitioners and the United States both urge a retreat, however. They contend that a *Bivens* cause of action should not exist where state law provides adequate alternative remedies. Pet. Br. 21-36; U.S. Br. 21-28. Their contention aggrandizes the role of state law; a federal constitution should be enforceable on its own terms, not merely when it lacks congruence with subconstitutional law. *See* Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. Cal. L. Rev. 289, 291 (1995). *Cf. Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 299 (1989) (O'Connor, J., concurring in part and dissenting in part) ("[T]he applicability of a provision of the Constitution has never depended on the vagaries of state or federal law").

Far from making state law the measure of federal contractors' conduct, the Court has previously found that in the arena of federal contracting, state law affirmatively must be *displaced* in favor of uniform federal rules. *See, e.g., Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) (creating a federal common law government contractor defense, immunizing a military contractor from state tort law liabilities). There is a considerable tension between the interest in uniformity, recognized in *Boyle*, and the suggestion made by Petitioners and the United States in this case that contractor liabilities should instead be *controlled* by state law. In this case, as in *Boyle*, the liability of federal contractors should be determined by federal not state statutory or common law. Statutes and the common law are not uniform from state to state, and states, of course, may also modify or repeal their statutory and common law rules at their pleasure.

C. State law is insufficiently protective of constitutional norms because it leaves many federally-protected rights unprotected, including, for example, many of the violations of due process suffered by Mexican nationals in privately-operated facilities.[28] These gaps between state law and the Constitution include remedial gaps for injuries resulting from barriers to detainees' access to counsel, to legal materials, and to their participation in hearings in which their parental rights are subject to termination.[29] These rights, among others, often have no clear counterparts in state tort law and no means of enforcement under state constitutions.[30] State law and the U.S. Constitution simply

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28. The due process rights of noncitizens under the Fifth Amendment are well established. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons...Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.") (citations omitted); *Wong Wing v. United States*, 163 U.S. 228 (1896).

29. "[T]he disparity in outcomes of immigration proceedings depending on whether noncitizens are unrepresented or represented is striking." Comm'n on Immigration, Am. Bar Ass'n, *Reforming the Immigration System: Proposals To Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* 5-3 (2010), http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf; Lisa Getter, *Few Applicants Succeed in Immigration Courts*, L.A. Times, April 15, 2001, at 20 (analysis of 1.2 million immigration cases, finding that "Immigrants with lawyers are 17 times more likely to avoid deportation than those without them.")

30. In both California and Texas, for example, two of the states in which large numbers of immigrants are detained, no

are not coextensive. As Justice Harlan noted, concurring in *Monroe v. Pape*, 365 U.S. 167 (1961), "It would indeed be the purest coincidence if the state remedies for violation of common law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection." 365 U.S. at 196 n.5.

State law is not only insufficiently protective of constitutional norms in general, it is also insufficiently protective of the rights of noncitizens in particular. "As a class," noncitizens, including Mexican nationals in the U.S., "are a prime example of a 'discrete and insular' minority." *Graham v. Richardson*, 403 U.S. 365, 372 (1971). Too often, they are subjected to "prejudice, passion, neglect, [and] intolerance." *Monroe v. Pape*, 365 U.S. 167, 180 (1961). As several states have passed omnibus immigration legislation and others have bills pending, state restrictions on the rights of Mexican nationals in the U.S. have recently been very much in evidence. *See, e.g.*, Arizona's S.B. 1070, enacted in April 2010;[31] Utah's H116, H466, H469 and H497, enacted on March 15, 2011;[32]

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implied right of action for damages exists for state constitutional violations. *Javor v. Taggart*, 98 Cal.App.4th 795, 807 (2002) ("It is beyond question that a plaintiff is not entitled to damages for a violation of the due process clause or the equal protection clause of the state Constitution."); *Harrison v. Texas Dept. of Criminal Justice-Institutional Div.*, 915 S.W.2d 882, 888 (Tex.App.–Houston [1 Dist.], 1995) ("[N]o implied private right of action for money damages exists under the Texas Constitution.")

31. http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf.

32. http://www.ncsl.org/documents/statefed/hb0116.pdf; http://www.ncsl.org/documents/statefed/hb0466.pdf; http://www.ncsl.org/documents/statefed/Utah_HB469.pdf and http://www.ncsl.org/documents/statefed/hb0497.pdf.

Georgia's HB87, signed May 13, 2011; Indiana's SB590, signed May 10, 2011; Alabama's HB56, enacted June 9, 2011; and South Carolina's S20 signed June 27, 2011.[33] *See also*, Texas's proposed HB 428 (which would bar a foreign consul from access to school campuses "if the foreign consul enters the campus with the intent to" distribute or accept applications for "foreign identification cards"), http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB00428I.htm. *See generally*, National Conference of State Legislatures, Report on State Omnibus Immigration Legislation (August 3, 2011) ("In 2011, 30 states considered 53 omnibus bills. Six omnibus bills have been enacted; 21 are pending or carryover bills"), http://www.ncsl.org/default.aspx?tabid=22529.

D. Even in cases where state law provides remedies, those remedies should be irrelevant to relief under *Bivens*.[34] Constitutional accountability should not turn

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33. http://www1.legis.ga.gov/legis/2011_12/pdf/hb87.pdf (Georgia); http://www.ncsl.org/documents/statefed/IndianaSB590.pdf; http://www.ncsl.org/documents/statefed/AlabamaH56.pdf; and http://www.ncsl.org/documents/statefed/SouthCarolinaS20.pdf.

34. Congressionally provided remedies may, by contrast, be relevant, if constitutionally adequate. See by analogy, *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n.*, 453 U.S. 1, 20 (1981) ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983"). The adequacy of such Congressionally provided remedies should, however, remain subject to judicial determination, bearing in mind Chief Justice Marshall's concern that the Constitution creates and constrains Congress, not the other way around. *Marbury*, 5 U.S. (1 Cranch) at 176-7. *See also, Boumediene v. Bush*, 553 U.S. 723, 765-66 (2008) (noting that because "the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation

on niceties of state law or vary from state to state. The federal interest, contractors' interests, and the interests of immigration detainees who are frequently transferred between facilities in different states will all be served best by a uniform, federal liability rule in this area.[35] Likewise the interests of Mexico and other foreign sovereigns, both in providing consular protection to their nationals and in knowing that the rights of their nationals will be protected

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of powers[,] [t]he test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.")

35. During Fiscal Year 2007, ICE transferred 261,910 detainees from one detention facility to another. U.S. Dep't of Homeland Sec., Office of Inspector Gen., Immigration and Customs Enforcement's Tracking and Transfers of Detainees 2 (2009), http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-41_Mar09.pdf. It has been reported that these transfers often occur without notification to detainees' families or counsel. NILC Report, *supra*, at 75-76. And it has also been reported that they "erect often insurmountable obstacles to detainees' access to counsel, ... impede [detainees'] rights to challenge their detention, lead to unfair midstream changes in the interpretation of laws applied to their cases, ... can ultimately lead to wrongful deportations ..., [and] also take a huge personal toll on detainees and their families, often including children." Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States* 2 (2009), http://www.hrw.org/sites/default/files/reports/us1209web.pdf. *Compare* Inter-American Comm'n on Human Rights, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle IX(4) ("[Transfers] shall take into account the need of persons to be deprived of liberty [to be] in places near their family, community, their defense counsel or legal representative, and the tribunal or other State body that may be in charge of their case"), http://www.cidh.oas.org/Basicos/English/Basic21.a.Principles and Best PracticesPDL.htm.

by the federal law of a single sovereign partner, based on precise legal grounds that are not subject to redefinition by any of the sovereign's political subdivisions, will also be served best by a uniform, federal liability rule in this area.

The enforcement of Constitutional rights against jailers engaged in state action, acting under color of law, and exercising "the most palpable form of state police power," *Richardson*, 521 U.S. at 414 (Scalia, J., dissenting), should not depend on federal vs. state law—or public vs. private—distinctions.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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